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Challenge Decisions at the Danish Institute of Arbitration

Johan TUFTE-KRISTENSEN^{*} & Steffen PIHLBLAD^{**}

Arbitral institutions make regular decisions on the required impartiality, independence and qualifications of arbitrators. The decisions and their underlying analyses are rarely available to the public. Therefore, the arbitration community is missing a valuable source of clarification and analysis, and a poor clarification and analysis may ultimately lead to untenable appointments and unfounded challenges.

The article and the following decision summaries explain how the Danish Institute of Arbitration approaches the challenge of arbitrators. The article is inspired by the arbitrator challenge digest published by the London Court of International Arbitration a few years ago, but the approach by the Danish Institute of Arbitration is unique in a number of ways.

The Institute's approach reflects a delicate balance between efficiency, flexibility, party autonomy and due process. Based on the fifty-seven challenge decisions outlined below, the article explains how the Institute aims at finding the right balance in a number of different circumstances. The article thereby provides a tool for in-house attorneys, external counsel, arbitrators, institutional staff and other arbitration practitioners to make the right arguments and proper analyses when dealing with issues concerning the challenge of arbitrators.

Confidentiality is one of the major advantages of arbitration, but the advantage has its downsides. A significant amount of legal analysis within various different legal areas remains confidential. This means that most of the working hours that arbitration practitioners spend on source retrieval, argumentation and analyses of complicated legal issues remain hidden in the practitioners' own databases.

The problem does not only impact substantive legal areas, but also procedural issues related to the law on arbitration. In many cases, the parties and their attorneys provide sophisticated sources and arguments on complicated procedural matters for the arbitrators and arbitral institutions to analyse and decide on. One of

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these procedural matters is the challenge of arbitrators. When challenge decisions remain confidential, practitioners and scholars lose a valuable source of clarification and analysis, which may ultimately lead to untenable appointments and unfounded challenges.

1 BACKGROUND

In Thomas W. Walsh and Ruth Teitelbaum's introduction to the digest of challenge decisions from the London Court of International Arbitration (LCIA), the authors stated that '[t]he LCIA is the only arbitral institution that provides ... reasoned [challenge] decisions to the parties.'¹ The Danish Institute of Arbitration (DIA) may not be as well-known as the LCIA, but the DIA does indeed issue reasoned challenge decisions too. Filing around 100 arbitrations each year, the DIA receives arbitrator challenges on a regular basis, and the challenges concern a variety of different facts and circumstances. The body that decides on the challenges is the DIA Chairman's Committee (the 'Committee').

There seems to be a tendency of increased focus on the impartiality and independence of arbitrators.² Statistics from the DIA confirm the tendency. Over the past decade, the DIA has experienced an increasing number of challenges and an increasing number of disqualifications on the Committee's own motion. In 2006 and 2007, the Committee rendered 2.35 decisions on the impartiality and independence of arbitrators out of every 100 initiated cases. In 2008 and 2009, the number had increased to 4.85 decisions out of every 100 initiated cases, and in 2010 and 2011, the number had further increased to 8.62 decisions out of every 100 initiated cases.

The tendency may indicate at least three different things, or a combination of them. It may indicate that the proposed arbitrators are not as impartial and independent as they used to be.³ It may also indicate that the agreed or mandatory requirements of the impartiality and independence of arbitrators have become stricter.⁴ Thirdly, it may indicate that parties and their counsel

¹ Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 Arb. Int'l 283, 283 (2011).

² See e.g. David Hacking, *Arbitration Challenges: Theirs Is to Reason Why*, 1 Global Arb. Rev. 26 (2006) (referring to statistics from other arbitral institutions).

³ It used to be common for parties and the DIA to appoint state court judges as arbitrators in DIA cases. In 2008, the Danish Parliament imposed a limit on the amount that a court judge may earn on the sideline, so court judges are no longer that commonly appointed. Consequently, practicing attorneys have become an increasing subject of appointment, and compared to court judges, practicing attorneys are usually less likely to be impartial and independent.

⁴ *Inter Forsikring A/S v. Mæglersekskabet af den 05.12.1995 A/S*, 1997 Ugeskrift for Retsvæsen 172 (Supreme Court of Denmark, 28 Nov. 1996) (the Supreme Court stated that arbitrators are subject to more lenient requirements than court judges are); Proposed Arbitration Act (Proposition no. 127 of 16

have become more aware of those requirements and are using them in an increasingly tactical manner.⁵

Either way, the increase reflects a problem; a challenge may be very inconvenient to the parties and the arbitrators. An award rendered by a partial arbitrator may even be detrimental. A major underlying cause of the problem may be a lack of knowledge about the requirements of impartiality and independence. If a party or its counsel does not know the essence of impartiality and independence, they may *appoint* arbitrators that *are not* impartial and independent or *challenge* arbitrators that *are* impartial and independent. If an arbitrator does not know what exactly the requirements mean, the arbitrator may accept an appointment despite being partial or may fail to meet the duty of disclosure. The arbitrator may also resign because of an unfounded challenge, thereby depriving the procedure of the arbitrator's unique qualifications without due cause. Untenable appointments and unfounded challenges contribute to the unfortunate development of reduced efficiency in arbitration.⁶ This is why there is a significant demand for information on challenge practices.

When the LCIA published its digest of challenge decisions in 2011, it provided a priceless contribution to the arbitration community.⁷ The digest contains decisions on a wide series of different facts and circumstances. The decisions are useful in themselves, but what is even more useful is the underlying argumentation and legal analysis behind each decision. The LCIA made their decisions available in an anonymized form so that their contribution to the arbitration community did not cause any harm to the parties. Since the LCIA published its digest, the Swiss Chambers' Arbitration Institution has published some of its challenge decisions in anonymized form too.⁸

Inspired by the LCIA, the DIA's Board has now decided to publish an outline of each challenge decision rendered under the DIA within the past ten years. The full digest contains fifty-seven outlines. Each of the outlines presents the Committee's decision on the facts and circumstances in the specific case as well as the relevant facts and arguments considered in order to reach that decision.

Due to the parties' demand for confidentiality, the DIA's Board was hesitant about publishing its challenge decisions. The choice to publish the decisions builds

Mar. 2005 for an act on arbitration) (DK), LFF2004-2005.2.127, comments on Art. 12 (according to the explanatory notes to the Danish Arbitration Act, arbitrators are subject to the same standards as court judges are).

⁵ See e.g. Gary B. Born, *International Commercial Arbitration* 1895 (2d ed., Kluwer Law International 2014).

⁶ Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25 Arb. Int'l 515 (2009).

⁷ 27 Arb. Int'l 283 (2011) (the digest makes up the entire third issue of volume 27).

⁸ Dr Rainer Füeg, *Case Law of the Court's Special Committee: Challenge of an arbitrator (Art. 11)*, Newsletter – 2/2015, Swiss Chambers' Arbitration Institution.

on a thorough balance of the demand for confidentiality, on one hand, and the value of information, on the other. In arbitration, the parties' demand for confidentiality generally outweighs the demand for public access to information; parties would not enter into arbitration agreements if they expected those agreements to make their possible future disputes end up on the cover of daily newspapers. Nevertheless, it is important to note that the access to information on arbitration practices may not necessarily cause any harm to the parties.

Anonymized challenge decisions do not have to reveal the parties' identities. Neither do they have to reveal the subject matter of the underlying disputes, because the relevant facts and circumstances in challenge decisions rarely relate to the subject matter of the underlying disputes. They do not even have to reveal the identities of the arbitrators and the parties' counsel. They merely have to reveal the facts and circumstances related to the alleged conflicts of interest as well as the adjudicating body's decision on the challenge, and public access to these pieces of information does not harm the parties. For the arbitration community, the information is an important source of information. Instead of reinventing the wheel every time a new challenge issue occurs, the party's counsel or the arbitrator may find guidance and inspiration in previous decisions on similar issues.

Article 34 of the DIA Rules lays down the general principle of confidentiality, but the provision nevertheless reflects the above-mentioned balance and provides for an opportunity to publish the Committee's challenge decisions in anonymized form. As indicated above, the rationale behind this opportunity is that the publication of the Committee's challenge decisions does not have to harm the parties in any way.

2 APPLICABLE SOURCES AND STANDARDS

Under the Rules of Arbitration Procedure of the DIA which are adopted by the DIA's Board and in force as from 1 May 2013 (the 'DIA Rules'), a party may challenge an arbitrator 'if it finds that circumstances exist, which give rise to justifiable doubts as to the impartiality or independence of the arbitrator, or if the party finds that the arbitrator does not possess the qualifications agreed on between the parties'.⁹ The provision is similar to the counterparts in the Danish Arbitration Act and the United Nations Commission on International Trade Law (UNCITRAL) Model Law ('Model Law').¹⁰ The procedural rules of other arbitral institutions contain similar provisions too.¹¹

⁹ DIA Rules, Art. 13(1) (first sentence).

¹⁰ Arbitration Act (Act no. 553 of 24 June 2005 on Arbitration) (DK) Art. 12 (2); Model Law, Art. 12(2).

¹¹ Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 Jan. 2010) ('SCC Rules'), Art. 15(1); Arbitration Rules of the London Court of International Arbitration

The provision itself is not very helpful when determining whether the facts and circumstances in a specific case disqualify an arbitrator, because the provision does not provide any clear indicators to apply when determining whether an arbitrator is subject to a conflict. One of the Danish statutory provisions on the impartiality and independence of court judges lists a series of concrete facts and circumstances that disqualify a court judge from deciding a case.¹² The explanatory notes to the challenge provisions in the Danish Arbitration Act refer to these rules, but the reference does not take account of the fact that arbitration and the appointment of arbitrators is different from litigation and the appointment of court judges.¹³ Therefore, and because of the broad wording of the challenge provision in the DIA Rules, the Committee may need additional means of interpretation, such as its own previous decisions, Danish and foreign case law, comparable areas of the law, and the International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Arbitration, in order to decide on a challenge.

As mentioned above, the Committee may apply *sources from comparable areas of the law*. In Case E-1241, the Committee referred to the Danish rules on professional conduct for the Danish Bar and Law Society.¹⁴ The rules are not binding, and they do not apply to the DIA and the Committee, but the Committee disqualified the arbitrator on the ground that the rules prohibited his conduct. The Committee does not explicitly refer to the rules in the Danish Administration of Justice Act applicable to court judges in any of its decisions despite the fact that the Danish Arbitration of Justice Act's explanatory notes refer to these rules.

The IBA Guidelines on Conflicts of Interest in International Arbitration are popular among parties when arguing whether a certain relation gives rise to justifiable doubts about an arbitrator's impartiality and independence. As a useful practical feature, the guidelines provide a series of concrete examples of facts and circumstances and explain what the legal consequences of these facts and circumstances would be under 'international principles and best practices'.¹⁵

Despite this feature, the IBA Guidelines do not always provide clear answers. Many of the facts and circumstances that give rise to challenges in proceedings under the DIA appear on the Orange List of the IBA Guidelines. The main

(1 Oct. 2014) ('LCIA Rules'), Art. 10.1(iii); Arbitration Rules of the Singapore International Arbitration Centre (1 Apr. 2013) ('SIAC Rules'), Art. 11(1).

¹² Administration of Justice Act (Consolidated act no. 1255 of 16 Nov. 2015 on the administration of justice) (DK), Art. 60(1).

¹³ Proposed Arbitration Act (Proposition no. 127 of 16 Mar. 2005 for an act on arbitration) (DK), LFF2004-2005.2.127, comments on Art. 12; *Inter Forsikring A/S v. Mæglersekskabet af den 05.12.1995 A/S*, 1997 Ugeskrift for Retsvæsen 172 (Supreme Court of Denmark, 28 Nov. 1996).

¹⁴ Rules on Professional Conduct for the Danish Bar and Law Society (Advokatetiske regler) (DK) (1 Nov. 2015) www.advokatsamfundet.dk (accessed on 24 October 2016). See *infra* Case E-1241.

¹⁵ IBA Guidelines on Conflicts of Interest in International Arbitration (23 Oct. 2014) ('IBA Guidelines'), 20-27.

purpose of the Orange List is to clarify the arbitrator's duty of disclosure.¹⁶ However, the Orange List does not provide much clarity to the question of whether an arbitrator is impartial and independent. It merely states that the exemplified situations *may* give rise to justifiable doubts about the arbitrator's impartiality and independence depending on the facts of a given case.¹⁷ If the circumstances appear on the Green List, the arbitrator is impartial and independent under international principles and best practices, whereas the opposite is the case if the circumstances appear on one of the two Red Lists, but if the circumstances appear on the Orange List, the international principles and best practices provide no clear answer.

Due to the broad variety of facts and circumstances on the Orange List, the parties frequently refer to the Orange List in their arguments, and the Committee refers to it in some of its decisions. The purpose of these references may either be to argue that the circumstances *do not* give rise to justifiable doubts, as in Case E-1202, or it may be to argue that the circumstances *do* give rise to justifiable doubts, as in Case D-836.¹⁸ Applied in the right rhetorical manner, the Orange List may support both arguments.

There used to be a tendency, at least until 2009, that an Orange List relation would not disqualify an arbitrator in proceedings under the DIA. For example, in Case D-807 from 2006, one of the parties challenged an arbitrator on grounds of the arbitrator's cooperation with the appointing party's counsel. The Committee referred to the Orange List and rejected the challenge because the respondent had not invoked *any other grounds* for the challenge.¹⁹

Since 2009, the tendency seems to have changed. In Case D-2269 from 2015, the Committee disqualified an arbitrator on grounds of the arbitrator's previous adversarial relation to a party.²⁰ In its decision, the Committee explicitly referred to the Orange List. The relations that made the Committee disqualify the arbitrators in other cases such as D-2245, D-2154, D-1917, D-1695, D-1615 and D-1585 appeared on the Orange List too.²¹

3 CONSENT, WAIVER, *SUA SPONTE* POWERS, AND TIME LIMITS

When reading the outlined decisions in the digest, the most important factor to look for may be the presence of a challenge. This may seem strange, because one

¹⁶ *Ibid.*, at 18.

¹⁷ *Ibid.*, at 18.

¹⁸ See *infra* Case E-1202 and Case D-836.

¹⁹ See *infra* Case D-807.

²⁰ See *infra* Case D-2269.

²¹ See *infra* Case D-2245, Case D-2154, Case D-1917, Case D-1695, Case D-1615 and Case D-1585.

would assume that the challenge is a precondition for the Committee's disqualification of an arbitrator. However, this is not the case. The DIA has a power to disqualify an arbitrator *sua sponte*, i.e. on its own motion.²² Some other arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce (ICC) and the LCIA, have similar powers under their arbitration rules, but the use of such powers is controversial.²³

Party autonomy is an important feature of arbitration.²⁴ The importance of party autonomy finds expression in a number of national and institutional rules on procedural matters, such as the appointment and challenge of arbitrators.²⁵ The parties normally play an active role in the appointment of arbitrators, and when the parties have appointed an arbitrator, the arbitrator generally stays in the tribunal until a party takes action to overthrow the arbitrator by means of a challenge.²⁶

Under the DIA Rules, the DIA has a power to confirm arbitrators. Technically, the parties did not *appoint* arbitrators in DIA proceedings until its current rules entered into force on 1 May 2013; the parties *proposed* arbitrators, and the Committee appointed them after performing its scrutiny.²⁷ Under the current DIA Rules, the parties appoint the arbitrators, but the practical reality is the same as it used to be: when a party appoints an arbitrator, the Committee performs its confirmation procedure, and if the Committee does not consider the arbitrator impartial and independent, it disqualifies the arbitrator.²⁸ The Committee may also disqualify an arbitrator after the arbitrator's appointment and confirmation if the arbitrator no longer possesses the required impartiality and independence at that point.

The DIA's confirmation procedure adds an extra category of facts and circumstances to the spectrum. There are not just a category of relations that *do not* disqualify an arbitrator and a category of relations that *do* disqualify an arbitrator whom a party has challenged. There is also a category of facts and circumstances so

²² DIA Rules, Art. 13(4).

²³ Rules of Arbitration of the International Chamber of Commerce (1 Jan. 2012) ('ICC Rules'), Art. 15(2); LCIA Rules, Arts 10.1 and 10.2.

²⁴ UNCITRAL 14th Session, International commercial arbitration: Possible features of a model law on international commercial arbitration, UN Doc A/CN.9/207 (19–26 Jun. 1981), para. 17 ('Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations.'). Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 187 and 355–356 (6th ed., Oxford University Press 2015); Born, *supra* n. 5, at 84–86.

²⁵ Model Law, Arts 11(2) and 13(1); Arbitration Act 1996 (UK), ss 16(1), 18(1) and 23(1); Federal Arbitration Act, 9 U.S.C. s. 5 (2006); ICC Rules, Art. 11(6); LCIA Rules, Art. 5.9; SCC Rules, Art. 13(1); SIAC Rules, Arts 9–11 and 16(4).

²⁶ See e.g. Model Law, Arts 11(3) and (4), 13(3); *Adam Technologies S.A. de C.V. v. Sutherland Global Services, Inc.*, 729 F.3d 443 (5th Cir. 2013).

²⁷ Rules of Arbitration Procedure of Danish Arbitration (15 Dec. 2008) ('2008 DIA Rules'), Art. 14(2).

²⁸ DIA Rules, Art. 11(1).

severe that they disqualify the arbitrator regardless of a challenge.²⁹ The distinction between the Waivable Red List and the Non-Waivable Red List in the IBA Guidelines reflects the same distinction.

The boundaries between the three categories are fluid. The Committee's practice suggests that the second and third categories are almost identical, which means that the Committee disqualifies an arbitrator *sua sponte* if it becomes aware of facts and circumstances that would have disqualified the arbitrator if a party had challenged the arbitrator. In Case D-2344, the Committee disqualified a sole arbitrator *sua sponte* on grounds of an adversarial relation between the arbitrator's law firm and the respondent.³⁰ In Case D-2333, the Committee disqualified an arbitrator *sua sponte* on grounds of an apparent risk of future adversarial relation between the arbitrator's law firm and the respondent.³¹ In Case D-1917, the Committee disqualified an arbitrator *sua sponte* on the ground that the arbitrator and a party's counsel were co-owners of the same hunting consortium.³² In Case D-1905, the Committee disqualified an arbitrator *sua sponte* on the ground that the arbitrator's law firm represented a party's sole shareholder in another case.³³ Comparing with the IBA Guidelines, the relations seem severe enough to appear on the Orange List but not severe enough to appear on the Non-Waivable Red List.

In a few decisions, the Committee has referred to the challenge as an independent ground tipping the scale towards disqualification. Such a reference indicates that the Committee would not have disqualified the arbitrator *sua sponte*. The Committee rendered one of these decisions in Case D-2245 where the challenge concerned the arbitrator's personal friendship with a party's counsel.³⁴ The arbitrator had participated in the counsel's wedding four months prior to the appointment. The challenge in Case E-1999 concerned the arbitrator's adversarial relation to a party's counsel. In its decision on this challenge, the Committee explicitly referred to its own standing practice of disqualifying arbitrators who are acting in a pending case against one of the parties *if that party challenges the arbitrator*.³⁵ The Committee also referred to the challenge as part of its reasoning when it disqualified an arbitrator on grounds of a regular adversarial

²⁹ *Ibid.* Art. 13(4); see *infra* Case D-2361, Case D-2344, Case D-2333, Case D-2233, Case D-2091, Case E-1944, Case D-1917, Case D-1905, Case D-1775, Case D-1767, Case D-1520, Case D-1469, Case E-1443, Case E-1241 and Case E-1202.

³⁰ See *infra* Case D-2344.

³¹ See *infra* Case D-2333.

³² See *infra* Case D-1917.

³³ See *infra* Case D-1905.

³⁴ See *infra* Case D-2245.

³⁵ See *infra* Case E-1999.

relation between the arbitrator's law firm and an organization representing a party in Case D-1944.³⁶

Under the DIA Rules, a party may waive its right to challenge an arbitrator by failing to raise the challenge within fifteen calendar days after becoming aware of the appointment of the arbitrator and the grounds for the challenge.³⁷ Most modern arbitration rules contain similar provisions, although the length of their time limits may differ.³⁸ There are strong rationales behind procedural time limits such as those. Without them, parties would be able to 'save' challenges to a late stage of the proceedings. On the other hand, there are strong arguments against strict time limits too. A party may fail to observe the time limit for excusable reasons, and a conflict of interest may be so severe that the rationales behind enforcing the time limit do not counterbalance the concerns associated with the conflict.

These are arguments that the Committee may have to balance from time to time, because when a party challenges an arbitrator after the expiration of the fifteen days' time limit under the DIA Rules, the Committee may disregard the time limit by disqualifying the arbitrator *sua sponte*. The Committee only does so if the relations are severe enough to override the importance of the time limit. In Case E-1202, it was unclear whether the challenging party raised the challenge within the time limit. The Committee emphasized its power to disqualify the arbitrator *sua sponte* and noted that the power made the time limit irrelevant under the given circumstances.³⁹ Thereby, the Committee implicitly stated that it would have disqualified the arbitrator in the absence of a challenge. The ground for the challenge was an adversarial relation between the arbitrator's law firm and the respondent in an unrelated matter. In Case D-1733, the Committee decided to consider the challenge despite a six weeks' delay, because the delay was a consequence of extenuating circumstances.⁴⁰ When the challenging party brought the challenge before a Danish court, the court rejected the challenge, but not on grounds of the delay.⁴¹

The Committee does not reject a challenge on grounds of a failure to observe the fifteen days' time limit in any of the decisions in the digest. Parties are generally good at observing the time limit, but on the few occasions where a party's compliance with the time limit has been uncertain, the Committee has used its *sua sponte* powers to consider the challenge anyway.

³⁶ See *infra* Case D-1944.

³⁷ DIA Rules, Art. 13(1).

³⁸ ICC Rules, Art. 14(2) (30 days); LCIA Rules, Art. 10.3 (14 days); SCC Rules, Art. 15(2) (15 days).

³⁹ See *infra* Case E-1202.

⁴⁰ See *infra* Case D-1733.

⁴¹ *X v. Voldgiftsinstituttet* (District Court of Lyngby, 1 Sept. 2011).

On some occasions, the DIA has to consider whether a party's critical or objecting remark is *a challenge or merely a remark*. The parties and their counsel sometimes express uncertainty or concern about the impartiality and independence of arbitrators without explicitly using the word 'challenge' or similar terms. For example, in Case D-2090, one of the parties requested the DIA to replace at least two of the three arbitrators with arbitrators from other geographical areas and to appoint at least one court judge.⁴²

As a general rule of cautiousness, the DIA interprets any expression that may possibly look like a challenge as a challenge. Otherwise, there would be a risk that a losing party would subsequently argue that the DIA did not consider the submission despite the fact that the intention with the submission was to raise a challenge. The DIA adopted the approach and interpreted the unclear request in Case D-2090 as a challenge, and it did the same thing in Case D-2121, after a party requested the DIA to decide whether the arbitrator was impartial and independent but noted that the request was not an 'actual challenge'.⁴³

The concept of *advance waivers* has become increasingly significant in DIA cases. With an advance waiver, the parties waive their right to challenge an arbitrator in case of future circumstances that give rise to justifiable doubts about the arbitrator's impartiality and independence. The issue of advance waivers typically arises at the time of appointment, when the arbitrator reserves the right to accept future assignments that would normally give rise to justifiable doubts about the arbitrator's impartiality and independence in the case. By doing that, the arbitrator attempts to make the parties accept, explicitly or implicitly, the possible future relations and thereby waive their right to challenge the arbitrator on grounds of them.

Perhaps not surprisingly, the DIA does not accept advance waivers as ways for the arbitrators to pre-empt and avoid successful challenges during the arbitral procedure. Case D-2364 concerns an arbitrator's attempt to impose an advance waiver on the parties by reserving his law firm's right to represent and act against a party's affiliates in other cases. The arbitrator added that the waiver should be understood as if the parties also waived the arbitrators' duty to disclose any such circumstances to the parties. The Committee deemed the reservation to be an advance breach of the arbitrator's duty of disclosure under Articles 12(2) and (3) of the DIA Rules and disqualified the arbitrator on grounds of the reservation.⁴⁴

In contrast to the original IBA Guidelines from 2004, the revised Guidelines from 2014 specifically address advance waivers.⁴⁵ According to the Guidelines, an

⁴² See *infra* Case D-2090.

⁴³ See *infra* Case D-2090 and Case D-2121.

⁴⁴ See *infra* Case D-2364.

⁴⁵ IBA Guidelines, 7.

advance waiver does not discharge the arbitrator's ongoing duty of disclosure, but the Guidelines do not otherwise address the validity and effect of advance waivers, which, according to the Guidelines, ultimately depend on the specific text of the waiver, the particular circumstances at hand and the applicable law.⁴⁶

4 SELECTED RELATIONS AND ARGUMENTS

The variety of different facts and circumstances that may give rise to successful challenges is indefinite, but some relations recur on a regular basis, and these relations tend to generate the same or similar arguments every time they recur. The following section addresses a number of these relations and arguments, including the cumulative effect of several different relations; the ongoing or previous nature of the relations; the effects of an arbitrator's public expression of legal opinions; the size of the pool of qualified arbitrators; the effects of an arbitrator's failure to meet the duty of disclosure; the arbitrator's reactions to the challenge; conflicts of interest among lawyers practicing at the same law firm or joint offices as the arbitrator; previous appointments; and third party funding.

The cumulative effect of several grounds is an issue that the Committee deals with on a regular basis. Many challenges concern more than one relation, and some challenges concern several different relations. When a party raises a challenge on grounds of several different relations, the Committee needs to determine the consequences of the mere fact that there are several relations. If, for example, a party has challenged an arbitrator on grounds of four insignificant relations, the mere fact that there are *four* relations may give rise to justifiable doubts about the arbitrator's impartiality and independence in the view of some. In the view of others, the arbitrator is impartial and independent unless at least one of the relations would *independently* give rise to justifiable doubts about the arbitrator's impartiality and independence.

Under the Committee's approach, several grounds for a challenge may have a cumulative effect, but the number of grounds may not in itself disqualify an arbitrator. In Case D-1878, the challenging party invoked three different grounds for the challenge, and in addition to these three grounds, the Committee considered a fourth possible ground *sua sponte*. The grounds concerned a variety of issues from the correspondence between the chair and a co-arbitrator, on one hand, to the arbitrator's behaviour, on the other. After going through each ground and rejecting them one by one, the Committee considered and rejected the four grounds as a whole.⁴⁷ In Case E-1269, the challenging party invoked four grounds

⁴⁶ *Ibid.* at 8.

⁴⁷ *See infra* Case D-1878.

too. The Committee did not expressly mention the grounds as a whole after rejecting them one by one, but it concluded that 'the grounds' did not disqualify the arbitrator.⁴⁸

The Committee's approach is to consider the grounds separately and as a whole and determine whether one of the separate grounds or the overall picture gives rise to justifiable doubts about the arbitrator's impartiality and independence. So far, no arbitrators have been disqualified by the Committee with reference to the cumulative effect.

Many challenges arise from existing relations, such as the adversarial relation between counterparties in a pending case, but *previous relations* give rise to a number of challenges too. When a party invokes a previous relation, such as a previous client relation between the arbitrator's law firm and a party or its subsidiary, the time gone by since the end of the relation is an important factor in the Committee's considerations.

The Committee has explicitly referred to the time factor in several decisions on previous relations. For example, in Case D-1260, the Committee disqualified an arbitrator because the client relation between the arbitrator and the CEO of a party's subsidiary did not end until shortly before the course of events giving rise to the dispute.⁴⁹ In Case D-1488, the Committee rejected a challenge due to the period of approximately three years that had lapsed since the arbitrator's law firm represented the party.⁵⁰ In Case E-1111, the Committee rejected a challenge due to the fact that the alleged roots of a hostile relation between the arbitrator and a party's counsel unfolded more than thirty years ago.⁵¹

Although the DIA applies a specific time limit when requesting all arbitrators to disclose their relations to the parties within the past five years, the Committee does not apply specific time limits in its decisions. As in most other respects, the Committee considers the specific circumstances in each case, and if the relations are no longer ongoing, the Committee may invoke the time factor as a reason for rejecting the challenge. Therefore, the three-year time limits in the IBA Guidelines are not always illustrative of the Committee's practice.

An arbitrator's *public expression of general opinions about legal issues* may make certain parties consider challenging the arbitrator, as it did in Case D-1887 and Case E-1099. The expression of opinions about legal issues does not give rise to justifiable doubts about the arbitrator's impartiality and independence, unless the expression concerns specific questions in dispute between

⁴⁸ See *infra* Case E-1269.

⁴⁹ See *infra* Case D-1260.

⁵⁰ See *infra* Case D-1488.

⁵¹ See *infra* Case E-1111.

the parties in the particular case.⁵² The Eastern High Court of Denmark confirmed this general rule when it decided a lawsuit between the challenging party in Case E-1099 and the DIA.⁵³

A controversial factor that the Committee does not necessarily consider is the size of the *pool of qualified arbitrators*. Some would argue that the size of the pool matters within specialized areas of the law, and especially in small legal systems, such as the Scandinavian legal system, where the number of qualified arbitrators within specialized areas of the law may be limited.⁵⁴

Non-challenging parties may argue that the small pool of arbitrators within the relevant legal area makes it hard for them to appoint qualified arbitrators in case the Committee disqualifies the arbitrator whom they have appointed. The non-challenging party invoked this argument in Case D-820.⁵⁵ Challenging parties, on the other hand, may argue that the Committee should disqualify an arbitrator if the access to appoint qualified arbitrators is easy. The challenging party invoked this argument in Case D-1944 and Case E-1099.⁵⁶

The size of the pool of qualified arbitrators does not seem to play a decisive role in the Committee's deliberations, because the Committee has not referred to it in any of its decisions. The Maritime and Commercial Court of Copenhagen referred to the argument in a challenge decision that arose out of an ad hoc arbitration case and ended up in the court in 2003.⁵⁷ The underlying dispute concerned reinsurance, and the court refused to disqualify the arbitrator by referring to the fact, among other things, that reinsurance is a strongly specialized area of the law. The losing party appealed the decision to the Danish Supreme Court, and the Supreme Court confirmed the decision but did not explicitly mention the argument regarding the small pool of arbitrators.⁵⁸ It remains uncertain whether

⁵² See *infra* Case D-1887 and Case E-1099.

⁵³ *X v. Voldgiftsinstituttet*, 2009 Ugeskrift for Retsvæsen 550 (Eastern High Court of Denmark, 27 Nov. 2008). As other Arbitration Acts based on the Model Law, the Danish Arbitration Act provides the challenging party with an opportunity to bring an unsuccessful challenge before the Danish courts. The challenging parties have only brought the Committee's challenge decisions before the Danish courts on a few occasions, and the courts have upheld the Committee's decisions in every one of those. See *X v. Voldgiftsinstituttet* (District Court of Copenhagen, 17 Apr. 2015); *X v. Voldgiftsinstituttet* (District Court of Lyngby, 1 Sept. 2011); and *X v. Voldgiftsinstituttet* (District Court of Copenhagen, 2 July 2010).

⁵⁴ *Maritime Hydraulics A/S v. Scottish Rig Repairers Ltd.*, 1991 Ugeskrift for Retsvæsen 418 (Supreme Court of Denmark, 11 Apr. 1991); Born, *supra* n. 5, at 1787–1788.

⁵⁵ See *infra* Case D-820.

⁵⁶ See *infra* Case D-1944 and Case E-1099.

⁵⁷ *ACE Insurance S.A.-N.V. v. Alm. Brand A/S*, 2003 Forsikrings – og Erstatningsretlig Domssamling 3177 (Maritime and Commercial Court of Copenhagen, 15 Dec. 2003).

⁵⁸ *Alm. Brand A/S Reassurance v. ACE Insurance S.A.-N.V.*, 2005 Ugeskrift for Retsvæsen 611 (Supreme Court of Denmark, 11 Nov. 2004); see also *Maritime Hydraulics A/S v. Scottish Rig Repairers Ltd.*, 1991 Ugeskrift for Retsvæsen 418 (Supreme Court of Denmark, 11 Apr. 1991) ('because there is no indication that it would be impossible or extraordinarily difficult to appoint another arbitrator with the same technical qualifications' (author's translation)).

the Supreme Court's omission of the argument implies that the size of the pool does not affect the requirements of the impartiality and independence of arbitrators under Danish law. Although Denmark is a small jurisdiction, it is hard to imagine a situation where it would be impossible or extraordinarily difficult to appoint an alternative arbitrator with the same, or at least sufficient, qualifications.

According to the IBA Guidelines, a small pool of arbitrators may affect the arbitrator's duty of disclosure. It follows from a footnote to the Orange List that '[i]t may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialized pool of individuals.'⁵⁹ The note also states that an arbitrator does not have a duty to disclose previous appointments if repeat appointments are customary within the given type of arbitration.⁶⁰

The DIA administers cases on a number of specialized areas, including shipping, sports and commodities, but the Committee has not referred to the size of the pool of arbitrators in any of its challenge decisions, so it remains uncertain whether the Committee will accept an argument that repeat appointments are customary within a certain type of arbitration.

The consequences of an arbitrator's *failure to meet the duty of disclosure* are another controversial issue. A breach of the duty may arguably affect the arbitrator's right to remuneration or make the arbitrator liable under Danish law.⁶¹ It remains uncertain whether the breach may in fact disqualify the arbitrator. According to the explanatory notes to the Swedish and Norwegian Arbitration Acts, in which Danish lawyers tend to find inspiration, an arbitrator's breach of the duty of disclosure may disqualify the arbitrator if the non-disclosed facts and circumstances are sufficiently severe.⁶² The Swedish Supreme Court has stated that a breach of the duty does not disqualify the arbitrator except in borderline cases where the decision is particularly difficult.⁶³ Under the IBA Rules of Ethics for International Arbitrators, an arbitrator's breach of the duty of disclosure is a sufficient ground for disqualifying the arbitrator.⁶⁴

⁵⁹ IBA Guidelines, 22.

⁶⁰ *Ibid.*, 22.

⁶¹ Proposed Arbitration Act (Proposition no. 127 of 16 Mar. 2005 for an act on arbitration) (DK), LFF2004-2005.2.127, comments on Art. 12. *See also Ruola Family v. X*, KKO:2005:14 (Supreme Court of Finland, 31 Jan. 2005) (the arbitrator's breach of the duty of disclosure made the arbitrator liable under Finnish law).

⁶² Proposed Arbitration Act (Government's proposition 1998/99:35 for a new arbitration act) (SE), 219; Utredning fra Tvistemålsutvalget oppnevnt ved kgl. res. 9. Apr. 1999 avgitt til Justis- og politidepartementet 20. desember 2001 (report on a revision of the Norwegian Arbitration Act), NOU 2001: 33, 119.

⁶³ *AB Fortum Värme et al. v. Korsnäs AB*, 2010 Nytt Juridisk Arkiv 317 (Supreme Court of Sweden, 9 June 2010).

⁶⁴ IBA Rules of Ethics for International Arbitrators, para. 4.1 (1987).

Danish law on the matter remains uncertain, and so does the Committee's approach to it. The arbitrator's breach of the duty of disclosure may potentially disqualify the arbitrator under Danish law provided that the character of the non-disclosed information makes the mere non-disclosure of the information give rise to justifiable doubts about the arbitrator's impartiality and independence, even though the information itself would barely disqualify the arbitrator.

When the Committee disqualifies an arbitrator, it may impact *the arbitrator's fees*. The disqualification does not always impact the arbitrator's fees, because the Committee usually disqualifies the arbitrator at the very early stage of the proceedings, but if an arbitrator conducts proceedings or perhaps even renders an award before being disqualified for lack of impartiality and independence, the arbitrator's fees may become subject to discussion.

On one hand, the arbitrator or a non-challenging party may argue that the arbitrator has provided the parties with a service that is subject to remuneration. If the arbitrator has prompted a settlement or contributed to the resolution of the parties' dispute in another way, the arbitrator's effort may have been valuable to the parties despite the lack of impartiality and independence.

On the other hand, the challenging party may argue that the arbitrator has not provided the parties with the service to which they were entitled. The arbitrator may have contributed to the settlement of the parties' dispute, but without being impartial and independent, the arbitrator may have contributed in an unfair and imbalanced way, and if that was not what the parties expected when deciding to settle their dispute by means of arbitration, the arbitrator has failed to satisfy the parties' demands in a justified manner.

If the arbitrator has intentionally failed to meet the duty of disclosure or has intentionally made him- or herself fail to meet the requirements of impartiality and independence during the case, the arguments against remuneration are even stronger. A breach of the arbitrator's duty of disclosure and arguably the arbitrator's intentional failure to meet the requirements during the case can affect the arbitrator's right to remuneration under Danish contract law.⁶⁵ However, it remains uncertain what exactly it takes to affect the arbitrator's right to remuneration.

The Committee considered the question in Case E-1350. Here, the Committee granted the arbitrator remuneration due to a presumption that the arbitrator had not been, and ought not to be, aware of the circumstances which, according to the claimant's counsel, made him biased.⁶⁶ In Case E-1202, on the other hand, the Committee refused to grant the arbitrator remuneration upon the

⁶⁵ Proposed Arbitration Act (Proposition no. 127 of 16 Mar. 2005 for an act on arbitration) (DK), LFF2004-2005.2.127, comments on Art. 12.

⁶⁶ See *infra* Case E-1350.

arbitrator's disqualification. The Committee blamed the arbitrator's disqualification on the arbitrator himself, and under the DIA's fee scales, the Committee would have to reduce the fees to the person who replaced the arbitrator in the tribunal in order to grant the disqualified arbitrator fees, and according to the Committee, that would not be fair under the given circumstances.⁶⁷ The Austrian Supreme Court has adopted a similar approach, although reducing the arbitrator's fees in proportion to the services that the arbitrator did in fact perform to the parties.⁶⁸

If the issue occurs in future DIA cases, the Committee will arguably consider the specific circumstances giving rise to the challenge, as well as the arbitrator's work and knowledge about the circumstances in each case, just as it did in Case E-1350 and Case E-1202. The fact that the Committee disqualifies an arbitrator during the case does not necessarily eliminate or even affect the arbitrator's right to remuneration.

Another issue that recurs from time to time is the *arbitrator's reactions to the challenge*. The Committee has not yet disqualified any arbitrators on grounds of their reactions, but the Committee has indicated that, depending on the character of the reactions, the Committee may disqualify an arbitrator on grounds of the reactions. In Case D-1878, which concerned an arbitrator's reaction to allegations about his personality trait, the Committee stated that strong reactions to a challenge *might disqualify* an arbitrator. Nevertheless, the Committee did not disqualify the arbitrator in the specific case, because in the Committee's view, the arbitrator merely dissociated from and expressed his disagreement with the allegations, and that does not give rise to justifiable doubts about the arbitrator's impartiality and independence.⁶⁹ In Case D-1690, the challenging party invoked the arbitrator's strong reaction against the challenge as an additional, independent ground for the challenge. The Committee disqualified the arbitrator but not on grounds of his strong reactions to the challenge.⁷⁰

Another recurrent argument concerns conflicts of interest among lawyers practicing at the same law firm or joint offices as the arbitrator. The majority of challenge decisions on client relations and adversarial relations do not concern the arbitrator's personal relations to a party or its affiliates but, on the other hand, a relation between the arbitrator's *law firm* and the party or affiliate. The extent to which the relation between an arbitrator's associate and a party may disqualify the arbitrator under Danish law and international best practices remains uncertain. Under the conflict-of-interest provisions in the non-binding Danish rules on

⁶⁷ See *infra* Case E-1202.

⁶⁸ *P v. F*, 4 Ob 197/13v (Austrian Supreme Court, 17 Feb. 2014); see the comment in Günther J. Horvath, *Compensation for a Dismissed Arbitrator?*, Kluwer Arbitration Blog (5 Aug. 2014).

⁶⁹ See *infra* Case D-1878.

⁷⁰ See *infra* Case D-1690.

professional conduct for the Danish Bar and Law Society, one attorney's prior client relation to a party may disqualify other attorneys working at the same law firm or sharing the same joint offices from being arbitrators in matters concerning that party.⁷¹ Under the Committee's approach, not only prior client relations but also ongoing and potential client relations as well as adversarial relations between a party and an attorney working at the same law firm or sharing the same joint offices as the arbitrator may disqualify the arbitrator.⁷²

This means that if there is a previous, ongoing or potential client relation or an adversarial relation between an arbitrator's law firm and a party, the Committee may treat the relation as if the arbitrator him- or herself had had the same relation to the party. In two of the Committee's most recent decisions, Case D-2344 and Case D-2333, the Committee disqualified the arbitrators *sua sponte* because of relations between the arbitrators' law firms and the parties.⁷³ The rationale behind such an approach is that different attorneys in one law firm have access to information about each other's clients and cases, share their profits, use the same brand, develop a personal relation from having lunch and other informal gatherings together, attending the same staff arrangements, etc.

However, not all law firms are alike. Some law firms may share everything within the firm whereas others may have well-established 'Chinese Walls' and other information barriers. Some entities, which may appear as law firms, are not even 'firms' but rather joint offices sharing the same name. In these firms, the partners do not share their profits and do not have access to information about each other's clients and cases. If an arbitrator is an attorney in one of these entities and another attorney in the entity has a client relation to one of the parties in the case, the relation between the arbitrator and the party is looser than it would be in a traditional law firm.

Sharing the same brand as a party's counsel may merely make the arbitrator *appear* biased, but the appearance of bias is sufficient to disqualify an arbitrator under the DIA Rules. Furthermore, the attorneys in these loose entities may have a close personal relation with one another from sharing the same offices. The Committee rejected the challenges in Case D-807, Case D-836 and Case D-1739 concerning loosely structured 'law firms', but in all of the cases, the time that had lapsed since the end of the relations played a decisive role.⁷⁴

⁷¹ Rules on Professional Conduct for the Danish Bar and Law Society (Advokatetiske regler) (DK), Arts 12.3 and 12.4 (1 Nov. 2015), www.advokatsamfundet.dk (accessed on 24 October 2016); Administration of Justice Act (Consolidated act no. 1255 of 16 Nov. 2015 on the administration of justice) (DK), Art. 126(4) ('An attorney may not ... engage in any conduct in which it is inappropriate for an attorney to engage' (author's translation)).

⁷² See e.g. *infra* Case D-2344, Case D-2333, Case E-1241 and Case E-1202.

⁷³ See *infra* Case D-2344 and Case D-2333.

⁷⁴ See *infra* Case D-807, Case D-836 and Case D-1739.

Previous appointments constitute another ground that challenging parties frequently invoke as a basis for their challenges. The effect of previous appointments depends on the size of the appointing party or its law firm and the extent of the arbitrator's activities as an arbitrator. It also depends on whether the previous appointor was a party or the party's counsel.

If the appointing party or law firm appoints arbitrators on a regular basis and the arbitrator serves as an arbitrator in a significant number of cases involving different parties and law firms, several recurrent appointments within a few years may not appear significant in the overall picture of the activities and may, therefore, not give rise to justifiable doubts about the arbitrator's impartiality and independence. For large entities such as major insurance companies and full service law firms, recurrent appointments are inevitable. On the other hand, if a small party or law firm with a limited flow of disputes appoints the same arbitrator a few times over a couple of years, it may appear as if the arbitrator is the party's or law firm's major appointee, and if the arbitrator rarely serves as an arbitrator, it may appear as if the appointing party or law firm is the arbitrator's major source of appointments.

There are more prospective parties than there are law firms and lawyers, so other things being equal, recurrent appointments from the same party are more prone to give rise to justifiable doubts about the arbitrator's impartiality and independence than recurrent appointments from the same law firm or lawyer are.

Under the IBA Guidelines, the arbitrator has a duty to disclose, and *may* be disqualified as a consequence of, previous appointments if the arbitrator has been appointed on two or more occasions by the same party or on three or more occasions by the same counsel within the past three years.⁷⁵ The Committee does not apply a strict three-year rule but considers the relevant circumstances, such as the size of the appointing party or its law firm and the extent of the arbitrator's activities as an arbitrator, in the concrete case.⁷⁶

Before confirming an arbitrator, the DIA asks the proposed candidate to submit a duly signed and dated declaration of impartiality and independence. The DIA has issued a standard declaration form for the arbitrators to complete. The form lists some examples of circumstances that the arbitrators should disclose. One of these examples is whether any of the parties or their counsel has appointed the arbitrator within the past five years.

⁷⁵ IBA Guidelines, 22 (para. 3.1.3 concerning previous appointments by the same party) and 24 (para. 3.3.8 concerning previous appointments by the same counsel).

⁷⁶ See e.g. *infra* Case D-2154; the Danish national courts have adopted a similar approach. *Alm. Brand A/S Reassurance v. ACE Insurance S.A.-N.V.*, 2005 Ugeskrift for Retsvæsen 611 (Supreme Court of Denmark, 11 Nov. 2004).

The fact that the declaration form encourages the arbitrators to disclose their previous appointments within the past five years does not make the Committee disqualify arbitrators in case of such previous appointments. Generally, disclosed information does not necessarily make an arbitrator biased. Unfortunately, some attorneys seem to raise challenges on grounds of anything possible, including all facts and circumstances disclosed by the arbitrators. It remains uncertain whether such unfounded challenges are results of dilatory tactics or a misbelief that an arbitrator's disclosure automatically disqualifies the arbitrator, but the published outlines of the Committee's challenge decisions may reduce the frequency of such unfounded challenges.

In order to reduce the risk of undisclosed conflicts of interest resulting from third party funding and other relations that the arbitrator may not know about at the time of appointment, the DIA has recently changed its disclosure policy so that it requests *parties* to disclose information that may give rise to justifiable doubts about an arbitrator's impartiality and independence.

An arbitrator may have a relation to a party through a third party that only the party knows about at the time of appointment. Such a relation may give rise to justifiable doubts about the arbitrator's impartiality and independence and may affect the arbitrator's decision-making if the arbitrator becomes aware of the relation during the case. Therefore, the party's early disclosure of such relations reduces the risk of challenges and promotes confidence in the procedure.

In its revised version of the IBA Guidelines from 2014, the IBA has introduced a requirement that the parties disclose relations between arbitrators and third party funders.⁷⁷ The IBA Guidelines are not binding, and they leave the possible consequences of a party's breach of the obligation unclear, so they do not solve the problem effectively, but they emphasize the importance of the parties' active contribution to the disclosure process. The ICC's Guidance Notes encourage arbitrators to consider possible third party funders when evaluating what facts and circumstances to disclose, but when all useful information about the parties' sources of funding is outside the arbitrators' reach, only the parties can procure and disclose the necessary information.⁷⁸

Generally, the parties seem to accommodate the DIA's requests for disclosure in a diligent manner, but the DIA does not have authority to sanction a party's failure to disclose information, and under the Danish Arbitration Act and the DIA

⁷⁷ IBA Guidelines, 15 ('A party shall inform ... of any relationship ... between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award').

⁷⁸ Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration, International Chamber of Commerce, para. 24 (13 July 2016) ('relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.').

Rules, only the arbitrator is subject to an explicit duty of disclosure. Although a party's failure to accommodate the DIA's request would not make the DIA impose any sanctions on that party, the failure would entail a risk that the Committee disqualifies the arbitrator at a later stage of the proceedings, thereby delaying the process and increasing the costs. The tribunal may impose those additional costs on the party who failed to accommodate the DIA's request for disclosure, so the party's failure to accommodate the request may ultimately result in a noticeable burden on that party.

5 DECISION SUMMARIES

The following section summarizes fifty-seven challenge decisions rendered by the Committee over the past ten years. The section does not divide the decisions into categories, because most of the decisions concern a number of different facts and circumstances. To put each decision into a certain category would entail a risk of oversimplifying the complexity of the decisions and end up creating more confusion than comprehension.

The Committee is not a permanent institution but is composed for each individual case. It consists of two of the DIA's board members, typically the chair and the vice chair. If the chair or the vice chair is involved in the case or has any relation to anyone involved in the case, the chair or vice chair in question steps back and lets another member of the board decide on the challenge instead.⁷⁹

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⁷⁹ DIA Rules, Art. 1(2) ('If the Chairman or the Vice-Chairman of DIA or both have a conflict of interest or are otherwise prevented from carrying out a function or make a decision, another member of the Board, respectively two other members of the Board, shall replace the Chairman and/or the Vice-Chairman.').

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D-1767	25 August 2011	Client relations	45
D-1761	29 August 2011	Client relations to a party's counsel	45
D-1739	31 August 2011	Previous practice in the same joint offices as a party's counsel	46
E-1734	12 September 2011	Relations to the same law firm	47
D-1733	23 June 2011	Client relations with a party's affiliates and a late challenge	48
D-1728	11 May 2011	Previous client rela- tions and adversarial relations	49

<i>Case</i>	<i>Date</i>	<i>Facts and Circumstances</i>	<i>Page</i>
D-1695	30 March 2011	Recent client relations	49
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D-1594	27 September 2010	A neighbourhood relation	53
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D-1489	19 March 2010	Previous work as arbitrator in a related matter	56
D-1488	4 March 2010	Client relations and adversarial relations	57
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D-1469	28 January 2010	A client relation	58
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E-1350	7 October 2010	The provision of a legal opinion in a related matter	60
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E-1099	19 September 2007	Public expression of opinions on legal issues related to the case	72
D-836	10 January 2007	Relations to a party's counsel and affiliate	73
D-820	12 September 2006	Client relations	74
D-807	6 July 2006	Relations to a party's counsel	75

5.1 CASE D-2364: ADVERSARIAL RELATIONS AND AN ATTEMPTED IMPOSITION OF ADVANCE WAIVERS

Decided on 4 January 2016

The decision concerned an arbitrator's reservation of his law firm's right to represent and act against a party's affiliates in other cases. It also concerns adversarial relations between an arbitrator's law firm and one of the parties.

On 21 August 2015, the claimant commenced arbitration at the DIA. The claimant appointed R as co-arbitrator, the respondent appointed C as co-arbitrator, and the DIA appointed N as the tribunal chair. R, C and N were all practicing attorneys. In R's declaration of impartiality and independence, R informed the parties and the DIA that his law firm reserved the right to represent and act against the respondent's affiliates in other cases. R further mentioned that his law firm represented the claimant and the respondent's affiliates in minor ongoing cases, and that his law firm acted against the respondent's affiliates in a number of ongoing cases.

The respondent's counsel challenged R on grounds of R's reservation and his law firm's ongoing adversarial relations to the respondent. The claimant's counsel argued that R was impartial and independent and noted that the respondent was part of a large group of affiliated companies to which most major Danish law firms had a relation. According to the claimant's counsel, it would be very difficult to find a qualified arbitrator if the appointment of R was not confirmed. R informed the parties and the DIA that neither he nor his law firm had any client relation or adversarial relation to the respondent; the relations were merely between R's law firm and the respondent's affiliates. The respondent's counsel maintained the challenge and referred to the IBA Guidelines' Orange List, which mentions a few examples on similar relations.

The Committee disqualified R. According to the Committee, the poor information provided about the adversarial relations between R's law firm and the respondent's affiliates did not give rise to justifiable doubts about R's impartiality and independence. However, R's reservation of his law firm's right to represent and act against the respondent's affiliates in other cases was an implicit statement that R would be prepared to subsequently breach his duty of disclosure if necessary. This advance breach of R's duty of disclosure under Article 12(2) and (3) of the DIA Rules gave rise to justifiable doubts about R's impartiality and independence.

5.2 CASE D-2361: A PROFESSIONAL RELATION

Decided on 9 December 2015

The decision concerned a professional relation between an arbitrator and a party. When K, whom the claimant had appointed, had submitted his statement of impartiality and independence, the respondent's counsel asked him to clarify the relation between the claimant and K. In his reply, K indicated that he had some, more or less remote, relations to the claimant. The DIA asked K to clarify the relations further, and it eventually appeared that K had close professional relations

to the sole shareholder in the claimant's parent company. Since May 2011, K had been the manager and director in a company half of which was owned by one of the claimant's managers and co-owners. Before that, and since 2007, K was one of the managers in the company, and when the company was voluntarily wound up in April 2014, K became the liquidator in the company.

The relations did not make any of the parties challenge K, but the Committee brought up the relation *sua sponte* under Article 13(4) of the DIA Rules and disqualified K. According to the Committee, the fact that the claimant's manager and co-owner owned half of K's employer around the time when the dispute took place gave rise to justifiable doubts about K's impartiality and independence.

5.3 CASE D-2344: AN ADVERSARIAL RELATION

Decided on 24 September 2015

The decision concerned an adversarial relation between the client of an arbitrator's law firm and a party. The DIA had appointed P, a practicing attorney, as the sole arbitrator in the case. After the appointment, P informed the DIA and the parties that a partner in his law firm represented a client in a pending dispute against the respondent. None of the parties challenged P, but the Committee brought up the relation *sua sponte* under Article 13(4) of the DIA Rules and disqualified P on grounds of the adversarial relation.

Interestingly, the Committee emphasized the fact that P was a sole arbitrator appointed by the Committee. According to the Committee, this made him subject to a stricter scrutiny than he would have been subject to if he had been the member of a three-member tribunal or appointed by the parties.

5.4 CASE D-2333: A POTENTIAL ADVERSARIAL RELATION

Decided on 13 August 2015

The decision concerned a potential adversarial relation between the client of an arbitrator's law firm and a party. When one of the arbitrators, C, who was a practicing attorney, submitted his declaration of impartiality and independence, he informed the DIA and the parties that a partner in his law firm represented a client in a lawsuit where the client and the respondent were both defendants. Despite the possibility that the respondent would later become a counterparty to the law firm's client, none of the parties challenged C. The Committee nevertheless brought up the relation *sua sponte* under Article 14(9) of the DIA Rules and disqualified C. According to the Committee, the lawsuit and the risk that it would develop into a

dispute between the respondent and a client of C's law firm gave rise to justifiable doubts about C's impartiality and independence.

5.5 CASE D-2284: PROFESSIONAL RELATIONS AND THE REPRESENTATION OF A PARTY'S SOURCES OF FUNDING

Decided on 5 May 2015

The decision concerned the impartiality and independence of an arbitrator who previously served in the same board as two members of the appointing party's management and represented two of that party's sources of funding.

On 28 January 2015, the claimant commenced arbitration at the DIA. Each party appointed a co-arbitrator. The claimant appointed S, who submitted a declaration of impartiality and independence and a CV. S informed the DIA and the parties that he had been a member of the same boards as two members of the claimant's management. The disclosure made the respondent challenge S, and the challenge made S add that he had previously been representing two of the claimant's sources of funding.

The board assignments were in two different companies. While S was a member of the board in one of them, the claimant's current manager, H, joined the same board. S and H were members of the board at the same time for approximately two years. After a demerger, S resigned from the board and became a member of the board of an affiliate for a shorter period. This was approximately two years prior to S's appointment as arbitrator. When S resigned from the affiliate's board, K, who was also a manager in the claimant, joined the board. Accordingly, S and H served in the same board for approximately two years, whereas S and K did not serve on the same board at the same time but replaced one another.

At the same time as S served on the first board, the company was involved in a significant transaction in which the respondent's daughter company was the company's counterparty. The transaction took place approximately two years prior to the claimant's appointment of S.

S's representation of the claimant's sources of funding took place more than seven years prior to the claimant's appointment of S. Back then, S was the partner of a major law firm that represented the two sources of funding. These were both major financial institutions.

The Committee rejected the challenge. The Committee noted that S served in the same board as H for approximately two years and resigned approximately two years prior to his appointment as arbitrator. According to the Committee, the fact that S had been a member of the same board as the claimant's manager does

not give rise to justifiable doubts about his impartiality and independence in light of these circumstances. The Committee considered the relation as an ordinary professional relation, and such a relation does not disqualify an arbitrator under the DIA Rules. The fact that the respondent's daughter company was S's counterparty in a previous transaction did not disqualify S either.

According to the Committee, S's representation of the claimant's sources of funding did not give rise to justifiable doubts about S's impartiality and independence either. The Committee emphasized the fact that the representation took place more than seven years prior to S's appointment as arbitrator.

5.6 CASE D-2269: PREVIOUS ADVERSARIAL RELATIONS AND PROFESSIONAL RELATIONS

Decided on 20 March 2015

The decision concerned a professional relation between an arbitrator and a party's counsel and a previous adversarial relation between the client of an arbitrator's law firm and a party. The law firm represented the party's opponent in an unrelated matter.

On 23 December 2014, two claimants commenced arbitration at the DIA. The claimants appointed J as co-arbitrator, and the respondent appointed P. The DIA appointed S as the tribunal chair. Two months later, on 23 January 2015, the claimants' counsel challenged P on the ground that P had represented the opponent of one of the claimants in a previous transaction and a previous dispute. P clarified his client relation and stated that another associate in his firm carried out most of the work on the transaction. The clarification did not make the claimants' counsel withdraw the challenge. On the contrary, the claimants' counsel informed the DIA that according to one of the claimants, P had a close relation to a partner in the law firm where the respondent's counsel worked. P confirmed that he had a relation to the partner but argued that it was a regular professional relation.

After the claimants' counsel had raised the relation between P and the partner as an additional ground for the challenge, the respondent's counsel raised a reverse challenge against J, the arbitrator appointed by the claimants. The challenge was not a traditional, unambiguous challenge but a conditional challenge. The respondent's counsel claimed that in case P's relation to the partner would make the DIA disqualify P, the DIA would also have to disqualify J due to similar relations between J and associates in the law firm where the claimants' counsel worked. J informed the DIA and the respondent that he was a member of the same board as a partner in the law firm where the claimants' counsel worked and added that partners in the firm had appointed him in two previous cases more than five

years ago. Based on the information provided by J, the respondent's counsel maintained the conditional challenge.

The Committee held that P's and J's relations to the appointing law firms did not disqualify P and J. According to the Committee, such relations are regular professional relations, which do not give rise to justifiable doubts about an arbitrator's impartiality and independence. The Committee noted the fact that the previous appointments of J were more than five years ago. It referred to paragraph 3.1.3 of the Orange List in the IBA Guidelines and noted that the provision only covers previous appointments made by the same *party* within the past *three years*.

As opposed to P's and J's relations to the appointing law firms, P's representation of the claimant's opponent in a previous transaction made the Committee disqualify P. The Committee noted that the adversarial relation lasted for approximately six months and took place approximately two years before the arbitration. According to the Committee, a finalized adversarial relation may or may not disqualify an arbitrator depending on the specific circumstances, notably the point in time when the adversarial relation ends and the possible relation between the previous case and the current case.

The Committee noted that the previous case had a remote relation to the current case, which gave rise to justifiable doubts about P's impartiality and independence despite its remoteness. The fact that it was not P himself, but another associate in his firm, who carried out most of the work on the transaction did not change the Committee's decision. The Committee referred to paragraph 3.1.2 of the Orange List in the IBA Guidelines, according to which adversarial relations to a party within the past three years may give rise to justifiable doubts about an arbitrator's impartiality and independence.

The decision shows that a regular professional relation between an arbitrator and an associate in the law firm where a party's counsel works does not disqualify the arbitrator under the DIA Rules. However, an arbitrator's previous adversarial relation to one of the parties disqualifies the arbitrator under the DIA Rules if there is a relation between the previous case and the current one.

5.7 CASE D-2245: A PERSONAL FRIENDSHIP

Decided on 5 February 2015

The decision concerned a personal relation between an arbitrator and a party's counsel. The arbitrator had attended the counsel's wedding four months prior to his appointment.

On 28 October 2014, the claimant commenced arbitration at the DIA. The claimant appointed T as co-arbitrator, and the respondent appointed O as co-arbitrator. The DIA appointed L as the tribunal chair.

When the DIA requested the arbitrators to return their statements of impartiality and independence, the DIA specifically asked O to clarify his relation to the respondent's counsel. O explained that he and the respondent's counsel had been members of the same board from 2008 to 2012 and that he had been a colleague of the counsel's husband from 1992 to 1994. O also mentioned that he had participated in social gatherings together with the respondent's counsel and her husband and that the respondent's counsel appointed him as arbitrator in a case in 2011. At the DIA's request, O clarified the extent of the social gatherings. He stated that he participated in the counsel's wedding four months earlier and that he and the counsel had participated in the same private arrangements on some occasions.

The information made the claimant's counsel challenge O. As a response to the challenge, O argued that he did not have any relations to the parties or any financial interest in the outcome of the case. He also argued that his relation to the respondent's counsel was primarily work-related. The claimant's counsel maintained the challenge.

The Committee noted that the challenge did not concern O's relation to any of the parties. Nor did it concern the professional relation between O and the respondent's counsel emanating from their membership of the same board from 2008 to 2012. According to the Committee, this professional relation and the previous appointment did not give rise to justifiable doubts about O's impartiality and independence. However, the Committee held that O's participation in the counsel's wedding four months prior to his appointment gave rise to justifiable doubts about O's impartiality and independence. The relation and the fact that the claimant's counsel raised a challenge made the Committee disqualify O. The Committee's reference to *the challenge* as part of the ground indicates that the Committee would probably not have disqualified O *sua sponte*.

5.8 CASE D-2233: MEMBERSHIP OF AN ASSOCIATION AND CORRESPONDENCE WITH A PARTY

Decided on 28 November 2014

The decision concerned the impartiality and independence of two different arbitrators appointed by the same party in the same case. One of them was a director of an association in which the appointing party was a member. The other one had communicated with the appointing party prior to the dispute.

The respondent had appointed A as co-arbitrator. A was the director of an association that safeguards the interests of a certain area of the Danish energy sector. The association had approximately 4,400 members, one of whom was the respondent. The claimant did not challenge A, but the Committee brought up the relation *sua sponte* and disqualified A on grounds of the relation. According to the Committee, A's position as director of an association that safeguards the interests of its members, one of whom was the respondent, gave rise to justifiable doubts about A's impartiality and independence.

After the Committee's disqualification of A, the respondent appointed H instead. When submitting his declaration of impartiality and independence, H stated that he had been corresponding with the respondent prior to the dispute. The correspondence had concerned a depreciation scheme and a purchase scheme, both of which played a role in the dispute. The information did not make the claimant challenge H, but the Committee disqualified H *sua sponte*. According to the Committee, H's correspondence with the respondent gave rise to justifiable doubts about H's impartiality and independence. The Committee mentioned the risk of non-recognition in its reasoning, both when it disqualified A and when it disqualified H.

5.9 CASE D-2154: PREVIOUS APPOINTMENTS AND PROFESSIONAL RELATIONS

Decided on 7 May 2014

The decision concerned previous appointments by one of the parties and its counsel as well as professional and political relations between an arbitrator and a party's counsel.

On 30 January 2014, the claimant commenced arbitration at the DIA. The claimant appointed P as co-arbitrator, and the respondent requested the DIA to appoint a qualified arbitrator on its behalf. The DIA appointed B on behalf of the respondent and appointed H as the tribunal chair.

In his statement of impartiality and independence, P stated that the claimant's counsel had appointed him in two previous cases and that he had appointed the claimant's counsel as arbitrator in a previous case. The statement triggered an extensive correspondence between P, the claimant's counsel, the respondent's counsel and the DIA's Secretariat, which shed some more light on the relation between P and the claimant's counsel. In the two previous cases where the claimant's counsel had appointed P, the counsel had appointed P on behalf of the same claimant as the claimant in the present case. Furthermore, P and the claimant's counsel were colleagues in the same law firm from 1992 to 1995 and

had been involved in the same professional networks. P had not decided the two previous cases, because both of them resulted in settlements.

Before the Committee decided on the challenge, the claimant's counsel handed the case over to his colleague at the same firm because of an assistant attorney's maternity leave. This meant that the claimant's counsel was no longer the person who had a relation to the arbitrator but another person working at the same law firm.

The Committee disqualified P. According to the Committee, the fact that P and the claimant's counsel were colleagues in the same law firm from 1992 to 1995 and were involved in the same industry-related networks did not give rise to justifiable doubts about P's impartiality and independence. The Committee noted that three appointments by the same counsel within a period of three-and-a-half years did not normally give rise to justifiable doubts about an arbitrator's impartiality and independence. However, not only did the claimant's counsel appoint P in the three cases, the claimant's counsel appointed P on behalf of the same claimant in all three cases. When a party challenges an arbitrator under these circumstances, the Committee disqualifies the arbitrator. According to the Committee, the fact that P had not decided the previous cases due to settlements and the fact that the claimant's counsel had handed over the present case to his colleague at the same law firm did not make P impartial and independent.

5.10 CASE D-2121: PREVIOUS APPOINTMENTS AND A ONE-TO-ONE LUNCH

Decided on 17 March 2014

The decision concerned previous appointments and an arbitrator's private lunch appointment with a party's counsel.

On 27 November 2013, the claimant commenced arbitration at the DIA. The claimant's counsel appointed M as co-arbitrator, and the respondent's counsel appointed J as co-arbitrator. With the DIA's assistance, the parties jointly appointed T as the tribunal chair.

Shortly after the claimant had appointed M, the respondent's counsel became aware of M and the claimant's counsel eating lunch together privately. The respondent's counsel asked the claimant's counsel to explain the lunch appointment and to disclose how many times his firm had appointed M within the past five years. M and the claimant's counsel confirmed that they had been eating lunch together, but they assured the DIA's Secretariat that the present case was not a topic of discussion during the lunch. M stated that the firm where the claimant's counsel worked had appointed him in three other cases within the past few years. Upon a request from the respondent's counsel, M further stated that his fees in

these cases were in the range between DKK 100,000 and DKK 500,000. M added that the firm where the respondent's counsel worked had appointed him in some cases too, and that his fees in these cases were in the range between DKK 100,000 and DKK 500,000 too. M assured the respondent's counsel that his income did not depend on appointments from the claimant's counsel.

The respondent's counsel requested the DIA to decide whether M was impartial and independent but noted that the request was not an 'actual challenge'. The DIA's Secretariat treated the request as a challenge under Article 13 of the DIA Rules and asked the Committee to decide on it.

The Committee rejected the challenge. As to the lunch appointment, the Committee noted that *ex parte* communications would generally give rise to justifiable doubts about an arbitrator's impartiality and independence. Nothing prevents the arbitrator from communicating with the parties or their counsel, but if the communication concerns issues related to the case, there is a risk that the arbitrator is no longer impartial and independent. The Committee did not find any reason to believe that M was dishonest when he stated that the case was not a topic of discussion during the lunch, so according to the Committee, the lunch appointment did not give rise to justifiable doubts about M's impartiality and independence.

As to the previous appointments, the Committee noted that the firm where the claimant's counsel worked had appointed M as arbitrator in three different cases within the past years and that none of these appointments were on behalf of the claimant. The Committee also noted that M was acting as an arbitrator in twelve pending cases and that he was not financially dependent on fees from the firm where the claimant's counsel worked. For these reasons, the Committee did not consider the previous appointments to give rise to justifiable doubts about M's impartiality and independence.

5.11 CASE E-2111: PREVIOUS APPOINTMENTS AND A SLIP OF MEMORY

Decided on 5 February 2014

The decision concerned previous appointments. An interesting issue raised by the decision is the question of whether an arbitrator's *memory* about the number of previous appointments may affect the arbitrator's impartiality and independence.

On 13 November 2013, the claimant commenced arbitration at the DIA and appointed F as co-arbitrator. The respondent appointed P as co-arbitrator, and the DIA appointed J as the tribunal chair. F submitted a declaration of impartiality and independence and informed the DIA and the parties that within the past five years, the appointing counsel's firm had appointed him in two previous cases.

Furthermore, he had appointed partners in the appointing counsel's firm in two previous cases.

The other co-arbitrator, P, informed the DIA and the parties that the firm where the respondent's counsel worked had appointed him in 'previous cases' within the past five years. At the DIA's request, P explained that the firm had appointed him in three different cases within the past five years and that it was the same attorney who had appointed him in all three cases. This attorney was also the respondent's counsel in the present case.

The claimant's counsel challenged P on grounds of the previous appointments, and as a reaction, the respondent's counsel challenged F on grounds of *his* previous appointments. At a later stage, the DIA's Secretariat became aware that the respondent's counsel had only appointed P in two of the three cases to which P referred. In the third case, the DIA had appointed P as the tribunal chair. The claimant's counsel maintained the challenge but indicated that the additional information uncovered by the DIA's Secretariat reduced his concern.

As to F's impartiality and independence, the Committee held that the previous appointments did not give rise to justifiable doubts about F's impartiality and independence. As to P's impartiality and independence, the Committee held that the previous appointments of P did not give rise to justifiable doubts about P's impartiality and independence either.

The Committee also addressed the impact of P's incorrect memory. One could argue that P's subjective perception of three previous appointments by the respondent's counsel is more important than the objectively correct number of previous appointments. This would make P's memory of three previous appointments decisive instead of the actual number of two previous appointments. However, the Committee held that the slip of memory, neither in itself nor in conjunction with the actual appointments, gave rise to justifiable doubts about P's impartiality and independence. Accordingly, the Committee rejected both of the challenges.

5.12 CASE D-2091: POTENTIAL INVOLVEMENT OF A REGULAR CLIENT

Decided on 20 December 2013

The decision concerned a situation where a regular client of an arbitrator's law firm would potentially be involved in the case. When the claimant had appointed P as co-arbitrator, P informed the DIA and the respondent that his law firm had an ongoing and regular client relation with a company that might be involved in the case. The dispute was between a sub-supplier and a supplier, and the client of P's law firm was the supplier's customer in the transaction that gave rise to the dispute,

so the client was a crucial party in the underlying transaction. Accordingly, it was possible that the parties would call the client's employees as witnesses in the case or involve the client in other ways.

Despite the relation, none of the parties challenged P. The Committee brought up the relation *sua sponte* under Article 13(4) of the DIA Rules and decided to disqualify P. According to the Committee, the possibility that the client would be involved in the case gave rise to justifiable doubts about P's impartiality and independence.

5.13 CASE D-2090: PROFESSION AND DOMICILE

Decided on 27 January 2014

This decision concerned a situation where all of the arbitrators in the tribunal were all practicing attorneys and were all domiciled in the same city as one party's counsel.

On 9 September 2013, the claimants commenced arbitration at the DIA. Under the parties' arbitration agreement, the DIA was supposed to appoint three arbitrators unless the parties could agree on a sole arbitrator. The parties were not able to agree on the appointment of a sole arbitrator, so the DIA appointed H, B and S as arbitrators.

The claimants' counsel practiced in the city of Aarhus, which is the second largest city in Denmark. His employer was a major Danish law firm with branches in Copenhagen as well as Aarhus. The respondents' counsel worked at a smaller law firm in Copenhagen, which is the capital of Denmark and the country's largest city. In addition to the dispute in question, the respondent was involved in another dispute against a party represented by another major law firm in Aarhus.

The three arbitrators, H, B and S, were all practicing attorneys, and they all practiced in Aarhus. The respondents' counsel, who practiced in Copenhagen, requested the DIA to replace at least two of the arbitrators with arbitrators from other geographical areas such as the Danish cities of Copenhagen, Odense, Aalborg or Esbjerg. The respondents' counsel also requested the DIA to appoint at least one court judge so that not all of the arbitrators were practicing attorneys. The claimants' counsel requested the DIA to maintain its appointment of H, B and S. The respondent's counsel maintained its request, which the DIA interpreted as a challenge of the arbitrators.

During the challenge procedure, B resigned voluntarily. The Committee then considered whether H and S satisfied the agreed requirements in the DIA Rules. First, the Committee referred to Article 13(1) of the DIA Rules and noted that the

provision allows the parties to challenge an arbitrator in case of justifiable doubts about the arbitrator's impartiality and independence or in case the arbitrator does not possess the agreed qualifications. The Committee further noted that the parties had not made any geographical restrictions to the arbitrators' domicile in their agreement. The two claimants and the two respondents were all domiciled in a city near Aarhus. According to the Committee, the fact that the arbitrators are domiciled in the same city as a party's counsel does not give rise to justifiable doubts about the arbitrators' impartiality and independence when that city is the second largest in Denmark.

As to the arbitrators' professions as practicing attorneys, the Committee noted that the parties had not made any requirement regarding the arbitrators' professions in their agreement. According to the Committee, H and S both possessed sufficient qualifications to act as arbitrators. Accordingly, the Committee rejected the challenge.

5.14 CASE E-1999: AN ADVERSARIAL RELATION TO A PARTY'S COUNSEL

Decided on 22 April 2013

The decision concerned an arbitrator's representation of an unrelated party in an unrelated dispute against the representative of one of the parties in the arbitration. It is important to note that the unrelated case involved the party's representative himself. The party's representative did not represent the adversarial party in that case; he was the party.

On 5 December 2012, the claimant commenced arbitration at the DIA. The claimant appointed H as co-arbitrator, and the respondent appointed G as co-arbitrator. When submitting his statement of impartiality and independence, G informed the parties and the DIA that he was representing the Disciplinary Board of the Danish Bar and Law Society in a lawsuit against the claimant's counsel. The lawsuit concerned a DKK 10,000 fine issued by the Disciplinary Board.

The disclosure made the claimant's counsel challenge G on grounds of the adversarial relation. G argued that the aim of the lawsuit was to clarify an important area of Danish advocacy law, which the Disciplinary Board could have brought against anyone, so the fine was not the main issue of the lawsuit. Nevertheless, the claimant's counsel maintained the challenge.

The Committee disqualified G. The Committee referred to its own standing practice, according to which a person cannot serve as arbitrator if that person is currently acting in a case, related or unrelated, against one of the parties, provided that the party challenges the arbitrator. The Committee applied the practice

analogously to the situation where G was acting against a party's *representative* and not against a party.

5.15 CASE E-1944: A CLIENT RELATION

Decided on 10 January 2013

The decision concerned a client relation between an arbitrator and the appointing party. The respondent had proposed A, a practicing attorney, as co-arbitrator. When submitting his statement of impartiality and independence, A informed the DIA and the parties that the respondent had been engaging him as counsel on a regular basis. Despite the client relation, none of the parties challenged A. The Committee brought up the relation *sua sponte* under Article 14(9) of the DIA Rules and disqualified A. According to the Committee, the regular client relation gave rise to justifiable doubts about A's impartiality and independence.

5.16 CASE D-1917: CO-OWNERSHIP OF A HUNTING CONSORTIUM

Decided on 16 August 2012

The decision concerned a personal friendship between an arbitrator and a party's counsel. On 13 July 2012, the claimant appointed C as arbitrator in a case under the DIA Rules. C informed the DIA and the parties that he, the respondent's counsel and a few other people, owned a hunting consortium together. None of the parties challenged C on grounds of the relation, but the Committee brought up the relation *sua sponte* and disqualified C. According to the Committee, the relation gave rise to justifiable doubts about C's impartiality and independence.

5.17 CASE D-1905: CLIENT RELATION TO A PARENT COMPANY

Decided on 13 July 2012

The decision concerned a situation where an arbitrator's law firm represents a party's sole shareholder. On 29 June 2012, the claimant appointed F as arbitrator in a case under the DIA Rules. The DIA's Secretariat later became aware that F's law firm was representing a client who appeared to be the claimant's sole shareholder. The law firm was one of the largest law firms in Denmark. Despite the relation, none of the parties challenged F, but the Committee brought up the relation *sua sponte* and disqualified F.

5.18 CASE D-1887: CLIENT RELATIONS AND ALLEGED PREDISPOSITION

Decided on 19 July 2012

The decision concerned the impartiality and independence of two different co-arbitrators. Both of them were practicing attorneys, and their respective law firms had represented the respective appointing parties. One of the co-arbitrators had assisted a Danish industry association with drafting three standard agreements and, after drafting the second of those, published a book about it.

On 15 March 2012, the claimant commenced arbitration at the DIA. The claimant was an IT supplier, and the respondent was a buyer. The claimant appointed C as co-arbitrator, and the respondent appointed T as co-arbitrator. C and T were both practicing attorneys. The parties jointly appointed J, a court judge, as the tribunal chair.

When submitting his declaration of impartiality and independence, C informed the DIA that his law firm had a pending client relation to the claimant. Over the previous years, C's law firm had assisted the claimant with three or four cases per year. The cases concerned employment law and tenancy, and they did not involve the law firm's IT and IP department, which was the department that C worked in. C also stated that he had assisted the Danish IT Industry Association with drafting three standard agreements in collaboration with the claimant's in-house attorney and some other IT lawyers. C and three other lawyers had published a commentary on the second one after they had drafted it. The dispute concerned a contract, which the parties had drafted from this standard agreement. Finally, C stated that one of the former employees at his law firm currently worked for the claimant.

The respondent's counsel challenged C on grounds of the relations. According to the respondent's counsel, C represented the 'supplier side' when he worked on the standard agreements, which indicated that he was predisposed in favour of the claimant who was an IT supplier. The claimant's counsel argued that C's work on the standard agreements did not make C predisposed in favour of the claimant; it rather indicated that C had some experience within the area.

According to the Committee, C's work on the standard IT agreements did not give rise to justifiable doubts about C's impartiality and independence. Neither did C's publication of the commentary on one of the standard agreements. The fact that the case concerned a contract drafted from this agreement did not make the Committee disqualify C.

According to the Committee, the fact that one of the former employees at C's law firm currently worked for the claimant did not give rise to justifiable doubts about C's impartiality and independence either. The Committee stated that such a

relation *could* give rise to justifiable doubts but that it would depend on the time when the employment ended and the former employee's involvement in the case. The Committee noted that it did not possess the information necessary to determine these factors.

However, the Committee disqualified C on grounds of the pending client relation between his law firm and the claimant. According to the Committee, such a relation gives rise to justifiable doubts about an arbitrator's impartiality and independence. The fact that C himself had not worked on the claimant's files or been in contact with the claimant did not make him impartial and independent in the Committee's view.

C was not the only arbitrator who was subject to a challenge in the case. T, whom the respondent had appointed, was subject to a challenge too. In T's declaration of impartiality and independence, T informed the DIA that his law firm's main client owned the respondent. He also stated that he chaired the respondent's annual meetings in 2011 and 2012. The claimant's counsel challenged T on grounds of these relations and requested T to provide further information on his law firm's work for the respondent over the past five years. T informed the claimant's counsel that other attorneys at his law firm had represented the respondent in a number of unrelated cases over the past five years.

The Committee disqualified T. According to the Committee, the fact that the respondent's owner was the main client in T's law firm and the facts that attorneys in the law firm had represented the respondent in other cases and that T had chaired the respondent's annual meeting gave rise to justifiable doubts about T's impartiality and independence.

5.19 CASE D-1878: ENMITY, STRONG EXPRESSIONS AND EX CO-ARBITRATOR COMMUNICATION

Decided on 15 July 2013

The decision concerned previous appointments by the appointing party's counsel and a client relation between the arbitrator and the appointing party's counsel.

On 21 February 2012, the claimant commenced arbitration at the DIA. The claimant appointed M as co-arbitrator, and the respondent appointed L as co-arbitrator. The parties had agreed that the two co-arbitrators should appoint the tribunal chair, so M and L appointed E as the chair. The DIA confirmed the appointments and constituted the tribunal on 30 August 2012.

On 2 May 2013, the respondent challenged the tribunal chair, E, on grounds of his behaviour. According to the respondent's counsel, E had addressed the respondent's counsel in a rude and unintelligible manner. Furthermore, the

respondent's counsel reported a bad experience with E's 'personality trait' from a parallel lawsuit in which the respondent's counsel and E, respectively, represented each of the opposing parties. The challenge triggered a long and heated correspondence between E and the respondent's counsel.

During the discussions, E became aware that L, whom the respondent had appointed, had advised the respondent's counsel in the parallel lawsuit. In a personal email, E asked L to consider his impartiality and independence in light of the advice. When the respondent's counsel became aware of E's email to L, the respondent's counsel invoked the email as a further ground for his challenge of E. At the same time, L clarified the relation and stated that he did not consider it to give rise to justifiable doubts about his impartiality and independence. L noted that he had prepared legal opinions for virtually all significant Danish law firms and that his relation to the respondent's counsel was a regular professional relation.

The Committee rejected the challenge of E. It considered each of the grounds invoked by the respondent's counsel independently, and brought up the mere fact that E and the respondent's counsel represented the opposing parties in a pending lawsuit *sua sponte* under Article 14(9) of the DIA Rules.

According to the Committee, the fact that E and the respondent's counsel represented the opposing parties in a pending lawsuit did not give rise to justifiable doubts about E's impartiality and independence. The Committee noted that it would disqualify an arbitrator if the arbitrator represented a client against one of the parties in the case, but according to the Committee, this practice did not extend to situations where an arbitrator and a party's counsel represent opposing parties in an unrelated matter.

As to E's behaviour in the parallel lawsuit, the Committee held that the allegations from the respondent's counsel did not give rise to justifiable doubts about E's impartiality and independence. The Committee noted that the allegations were unsubstantiated and that E contested them. E's reaction to the allegations did not give rise to justifiable doubts either. According to the Committee, an arbitrator's strong reactions to a challenge may disqualify the arbitrator, but the Committee considered E's reaction to be a mere dissociation from the allegations, which does not generally give rise to justifiable doubts about the arbitrator's impartiality and independence.

According to the Committee, E's behaviour in the arbitration did not give rise to justifiable doubts about E's impartiality and independence either. The respondent's counsel claimed that E had addressed him in a rude and unintelligible manner, but the Committee considered E's communication to be neither partial nor unfair.

E's email to L did not disqualify E either. The Committee referred to Article 14(6) of the former DIA Rules, which allowed an arbitrator to

challenge another arbitrator. The Committee noted that E's email to L was not even a challenge but merely a request to consider whether L's relation to the respondent's counsel was covered by L's duty of disclosure under Article 14(3) of the DIA Rules, which did not give rise to justifiable doubts about E's impartiality and independence.

None of the parties challenged L despite the fact that L had advised the respondent's counsel in a parallel lawsuit. The Committee brought up the relation *sua sponte* under Article 14(9) of the DIA Rules. According to the Committee, the relation between L and the respondent's counsel did not disqualify L. However, the Committee held that the relation was within L's duty of disclosure and that L therefore had a duty to inform the parties about the relation, which he would arguably have omitted if it had not been for E's request.

Over the past decade, the DIA has aimed at increasing its international outlook. The institute took a significant step in that direction by amending its rules in 2013. The current DIA Rules are similar to the rules of the ICC and the Arbitration Institute of the Stockholm Chamber of Commerce in several respects. One of the specific amendments concerns the arbitrator's opportunity to challenge another arbitrator. Whereas the former DIA Rules explicitly provided the arbitrators with such an opportunity, the current DIA Rules do not contain a similar provision, but they do not explicitly prevent an arbitrator from notifying the DIA or the parties about another arbitrator's possible conflicts of interest either. If an arbitrator becomes suspicious that one of the other tribunal members is not impartial or independent, the arbitrator may even have a duty to notify the DIA about the circumstances, because a failure to do so may jeopardize the award.

5.20 CASE D-1856: RELATIONS BETWEEN A TRIBUNAL CHAIR, A CO-ARBITRATOR
AND A PARTY'S HOME COUNTRY

Decided on 11 October 2012

The decision concerned the relation between two arbitrators and the relation between these two arbitrators and France, which was the home country of one of the parties. One of the arbitrators was the tribunal chair appointed by the DIA, and the other was a party-appointed co-arbitrator. They were both admitted to the Paris Bar, and they had both worked at the same law firm at the same time. They were also both related to the ICC and a French arbitration association.

On 6 January 2012, the claimant commenced arbitration at the DIA. The claimant was Danish and the respondent was French. The claimant's counsel proposed A as co-arbitrator, and the respondent's counsel proposed F as co-

arbitrator. The DIA proposed N as the tribunal chair. A, F and N were all practicing attorneys. A was a Danish attorney practicing in Denmark, F was a French attorney practicing in France, and N was a Polish attorney admitted to the French Bar but practicing in Poland. The case concerned Danish law and French evidence.

When contacted by the DIA, F informed the DIA that he had worked at the same law firm as N but in a different branch in a different country and only for fourteen months. The two had never worked on any cases together. The claimant's counsel challenged N, not only on grounds of the information disclosed by F but also on the ground that N did not have experience with Danish or, at least, Nordic contract law. According to the claimant's counsel, the tribunal chair should be familiar with the governing contract law. The claimant's counsel further noted that F used to work at the ICC Secretariat while N was a member of the ICC Court and that N and F were both members of a French association of arbitration lawyers.

As a response to the challenge, N noted that he had advised several Nordic clients so that he had some experience with Nordic law. He also noted that the parties had not written anything about these qualification requirements in their arbitration agreement. According to N, he had never worked together with F, neither in the ICC nor at his law firm. As an argument against the seriousness of his membership of the ICC Court, N noted the fact that an attorney from the law firm where the respondent's counsel worked was a member of the ICC Court too.

N believed that his knowledge of French law and French language would be an advantage rather than a problem, because many of the documents in the case were in French. According to the claimant's counsel, this was problematic because it would leave A, who was a Danish attorney without much knowledge about French law or French language, as the only tribunal member to rely on the English translations of the documents. The claimant's counsel noted that the language of the arbitration was English, so it was not even necessary for the arbitrators to speak French.

The claimant's counsel also argued that the fact that N and F both had admission to the French Bar might be contrary to Article 20 of the applicable 2008 DIA Rules requiring that the tribunal chair's domicile must be different from the domicile of any of the parties when the parties are domiciled in different countries.

The Committee considered each of the grounds separately. As to N's and F's work at the same law firm at the same time, the Committee held that the relation did not give rise to justifiable doubts about N's impartiality and independence. The Committee emphasized the facts that the relation ended

four years prior to the appointment and that F had only worked for the firm for approximately fourteen months.

The fact that F used to work at the ICC Secretariat while N was a member of the ICC Court did not disqualify N either. The Committee noted that the ICC Court and the ICC Secretariat are different bodies that carry out different functions.

Nor did the fact that N and F were members of the same French association of arbitration lawyers disqualify N. The association had 603 members, and its purpose was merely to promote knowledge and transparency in the French arbitration community.

As to Article 20 of the former DIA Rules, the fact that N had admission to the French Bar did not disqualify him under the provision because the provision deals with the arbitrator's domicile and not the arbitrator's Bar admissions.

N's language qualifications did not disqualify him either. The Committee found no reason to doubt N's English abilities, and the Committee considered him fully capable of handling the applicable law in light of the information about his experience and skills.

The Committee noted that N's duty of disclosure covered the fact that N and an attorney from the law firm where the respondent's counsel worked were both members of the ICC Court. N disclosed the relation but not until the claimant's counsel had challenged him and only at the request of the DIA Secretariat. N should have disclosed the information at the time of his appointment. However, the Committee did not consider the relation to give rise to justifiable doubts about N's impartiality and independence. The ICC Court had more than 100 members, and there was no indication that N and the respondent's counsel had worked together on any cases in the ICC Court.

According to the Committee, none of the individual relations nor the relations cumulatively gave rise to justifiable doubts about N's impartiality and independence. Accordingly, the Committee rejected the claimant's challenge.

5.21 CASE D-1850: PREVIOUS AWARD ON ANOTHER ISSUE IN THE SAME DISPUTE

Decided on 23 April 2012

The decision concerned an arbitrator's alleged predisposition emanating from the knowledge that the arbitrator has obtained by rendering a previous award in the same case.

On 2 June 2010, the claimant commenced arbitration at the DIA. The DIA opened the case and registered it as Case D-1590. The claimant's counsel proposed H as co-arbitrator, and the respondent's counsel proposed J as co-arbitrator. H and

J proposed T as the tribunal chair. The DIA appointed all of them. H was a law professor, J was a practicing attorney, and T was a law professor. On 1 July 2011, the tribunal rendered an award. The DIA sent a closing letter to the parties and reimbursed the excess amounts from the deposits.

On 11 November 2011, the respondent's counsel submitted a written rejoinder and a new exhibit in the case. The DIA informed the counsel that the tribunal had closed the case and rendered an award. This was a surprise to the respondent's counsel, who thought that the final hearing was only an interim hearing on a partial issue. The respondent's counsel requested the tribunal to reopen the case, which the tribunal denied. However, the tribunal encouraged the respondent's counsel to initiate a new case on the issue that the rejoinder and the new exhibit concerned. The tribunal informed the respondent's counsel that it would be happy to serve in the new case too so that the parties would not have to appoint a new tribunal.

The respondent's counsel informed the tribunal that he was willing to maintain the same tribunal, so he proposed J as co-arbitrator on behalf of the respondent again. The claimant's counsel did not want to maintain the same tribunal. He informed the respondent's counsel that he did not intend to appoint H again and that he challenged J on the ground that J had decided Case D-1590.

According to the claimant's counsel, the fact that J had already rendered an award in the previous case would make J predisposed when rendering an award in the new case. The claimant's counsel noted that the award in Case D-1590 would be the basis of the tribunal's decision in the new case and that J therefore might base his decision on circumstances that the parties would not be able to comment. According to the claimant's counsel, the reappointment of any of the arbitrators who decided Case D-1590 would give rise to justifiable doubts about the arbitrator's impartiality and independence from an *appearance* perspective.

The respondent's counsel argued that the new case in reality was just a continuation of Case D-1590. The claimant's counsel argued that this continuation would make the new tribunal consider whether the tribunal in Case D-1590 *should have* acted differently. Accordingly, J would need to consider his own role as arbitrator in Case D-1590 if the respondent's counsel reappointed him.

The Committee stated that an arbitrator's previous decision in one case does not disqualify the arbitrator from all subsequent cases involving similar issues. If this were the case, it would lead to increased costs. However, the Committee disqualified J due to the risk that his knowledge about Case D-1590 would prevent him from considering the case with an open mind.

5.22 CASE D-1799: CLIENT RELATIONS

Decided on 22 November 2011

The decision concerned a client relation between a counsel's law firm and a co-arbitrator. In this case, the co-arbitrator was the client.

On 26 August 2011, the claimant commenced arbitration at the DIA. The claimant's counsel proposed J as co-arbitrator, and the respondent's counsel proposed L as co-arbitrator. The DIA proposed C as the tribunal chair. J was a practicing attorney, L was a CEO, and C was a court judge.

When the DIA requested the parties to comment on the proposals, the claimant's counsel challenged L on grounds of a relation between L and the respondent's counsel. According to the claimant's counsel, L and a partner of the respondent's counsel were directors in the same company. The partner of the respondent's counsel was the president of the company's board. L did not comment on the matter, but the respondent's counsel contested the challenge and argued that the relation did not disqualify L. The respondent's counsel informed the DIA and the claimant that the partner, who was a member of the same board as L, had advised L on some legal matters.

The Committee noted that there was a client relation between L and the law firm where the respondent's counsel worked. According to the Committee, such a relation gave rise to justifiable doubts about L's impartiality and independence, so the Committee disqualified L. The Committee did not consider the board relation in its decision.

5.23 CASE D-1781: LACK OF TECHNICAL SKILLS

Decided on 18 October 2011

The decision concerned an arbitrator's qualifications and the question of whether a party may require that a sole arbitrator be in possession of technical rather than legal skills.

On 6 July 2011, the claimant commenced arbitration at the DIA. According to the parties' arbitration agreement, a sole arbitrator should settle the dispute, and in case the parties could not agree on a sole arbitrator, the DIA should appoint a sole arbitrator under the DIA Rules.

The respondent's counsel proposed two arbitrators, who were both engineers. The claimant's counsel rejected the proposals and informed the respondent's counsel that he would prefer a lawyer, preferably a court judge or an attorney,

with a strong knowledge of commercial tenancy and contract interpretation. The respondent's counsel disagreed and argued that the character of the dispute called for an arbitrator with strong technical skills.

When it became clear that the parties could not agree, the DIA proposed H, a court judge, as the sole arbitrator. The claimant's counsel accepted the proposal, but the respondent's counsel rejected it and challenged H on grounds of the need for technical rather than legal skills in the case.

The Committee noted that the parties' arbitration agreement contained no requirements about special skills. For this reason and because H possessed the qualifications necessary to act as an arbitrator, the Committee rejected the challenge.

5.24 CASE D-1775: PREVIOUS ATTEMPTS TO CONCILIATE A SETTLEMENT IN THE SAME DISPUTE

Decided on 7 October 2011

The decision concerned an arbitrator's previous attempts to conciliate a settlement between the parties. After the appointment of K, the DIA became aware that K had acted as a conciliator in the same case. The conciliation involved the same parties and the same factual issues, but it involved legal issues that were slightly different from the legal issues involved in the arbitration. None of the parties challenged K, so the Committee brought up the relation *sua sponte* under Article 14(9) of the DIA Rules. The Committee disqualified K because of the possible predisposition emanating from K's attempts to conciliate a settlement in the case.

5.25 CASE D-1767: CLIENT RELATIONS

Decided on 25 August 2011

The decision concerned a client relation between an arbitrator's law firm and a party. The arbitrator, M, had informed the DIA and the parties that his law firm was providing legal assistance to one of the parties in the case. The disclosure did not make any of the parties challenge M, but the Committee brought up the relation *sua sponte* under Article 14(9) of the DIA Rules and disqualified M. According to the Committee, the client relation gave rise to justifiable doubts about M's impartiality and independence.

5.26 CASE D-1761: CLIENT RELATIONS TO A PARTY'S COUNSEL

Decided on 29 August 2011

The decision concerned an arbitrator's client relation to a party's counsel. It is important to note that the client relation was not between the arbitrator and *the party* but between the arbitrator and *the party's counsel*.

On 13 May 2011, the claimant commenced arbitration at the DIA. The claimant's counsel proposed J as co-arbitrator, and the respondent's counsel proposed H as co-arbitrator. J and H were both practicing attorneys. The parties agreed that J and H should appoint the tribunal chair, but before the two co-arbitrators got so far, J informed the DIA and the parties that he represented four attorneys, one of whom was the claimant's counsel, in a pending lawsuit against the attorneys' former law firm.

The disclosure made the respondent's counsel challenge J on grounds of the client relation. J contested the challenge and argued that the only time he communicated with the claimant's counsel was when the counsel called him and asked if he would be willing to act as arbitrator in the case. J's communication with the four defendants in the lawsuit, one of whom was the claimant's counsel, did not go through the claimant's counsel but through one of the other defendants.

The Committee disqualified J. According to the Committee, J's representation of the claimant's counsel in a pending lawsuit gave rise to justifiable doubts about J's impartiality and independence. The fact that J and the claimant's counsel did not have any personal communication about the case did not make J impartial and independent in the Committee's view.

5.27 CASE D-1739: PREVIOUS PRACTICE IN THE SAME JOINT OFFICES AS A PARTY'S COUNSEL

Decided on 31 August 2011

The decision concerned a situation where an arbitrator used to practice in the same joint offices as a party's counsel over a period of approximately eight years. The arbitrator and the counsel did not share profits or have access to each other's files and databases.

On 2 March 2011, the claimant commenced arbitration at the DIA. The claimant's counsel proposed K as co-arbitrator, and the respondent's counsel proposed P as co-arbitrator. The DIA proposed B as the tribunal chair. K, P and B were all practicing attorneys. It followed from K's CV that K practiced in the

same joint offices as the claimant's counsel in the period between 2000 and 2007. During this period, the claimant's counsel advised the claimant about some of the agreements that the case concerned.

The respondent's counsel challenged K on grounds of the relation and invoked the Danish rules on professional conduct of the Danish Bar and Law Society. Under these rules, one attorney's prior client relation to a party may disqualify other attorneys working at the same law firm from being arbitrators in matters concerning that party. The claimant's counsel confirmed the fact that he and K used to practice in the same joint offices, but he argued that K had had his own staff and accountancy and that the individual practitioners in the joint offices did not share their profits. Notably, K and the claimant's counsel did not have access to each other's files and databases.

The Committee rejected the challenge. According to the Committee, the relation did not give rise to justifiable doubts about K's impartiality and independence. The Committee emphasized the fact that the claimant's counsel and K did not have access to each other's files and databases and that K resigned from the joint offices more than three-and-a-half years prior to the case. The fact that K practiced in the same joint offices as the claimant's counsel at the time when the claimant's counsel advised the claimant on important parts of the contractual basis of the case did not change the Committee's view, because K was not involved in the counsel's advice.

5.28 CASE E-1734: RELATIONS TO THE SAME LAW FIRM

Decided on 12 September 2011

The decision concerned a situation where two of the arbitrators used to work at the same law firm. The proposed tribunal chair used to be a partner in the law firm where one of the party appointed arbitrators was a partner. The proposed tribunal chair retired more than five years before the proposal, and he and the party-appointed arbitrator did not have any significant contact.

On 28 February 2011, the claimant commenced arbitration at the DIA. The claimant proposed H as co-arbitrator, and the respondent proposed A as co-arbitrator. In accordance with the DIA Rules, the DIA requested the parties to appoint a tribunal chair jointly. The parties were not able to agree on a chair, so the DIA proposed V as the tribunal chair. H and A were practicing attorneys, and V was a law professor.

After the DIA's proposal, the claimant's counsel informed the DIA and the respondent that the claimant did not think that V possessed sufficient commercial experience and the technical understanding required to act as the tribunal chair in

the case. The claimant's counsel therefore requested the DIA to propose a different chair. V stepped back voluntarily, and the DIA informed the parties that it would propose another chair unless the parties could agree on one. The respondent's counsel responded that he did not agree with the claimant's request to appoint a different chair with more commercial experience and technical understanding. According to the respondent's counsel, the case involved complicated matters of contract interpretation and therefore required a chair with significant legal qualifications.

The DIA proposed B, a retired attorney from a large law firm, as the tribunal chair. B informed the DIA and the parties that he used to be a partner in the same law firm as H until he retired five-and-a-half years ago. According to B, his only remaining connection to the law firm was his reception of a law commentary from the firm each year. The claimant's counsel accepted the proposal of B, but the respondent's counsel objected to the proposal on grounds of his relation to H. In response to the objection, the claimant's counsel argued that B retired from the firm more than five years ago and that B and the other arbitrator did not have any significant contact.

On 12 September 2011, the Committee rejected the objection. According to the Committee, the facts that B retired from the firm five-and-a-half years ago and that B and the other arbitrator did not have any significant social or professional contact made B impartial and independent.

5.29 CASE D-1733: CLIENT RELATIONS WITH A PARTY'S AFFILIATES AND A LATE CHALLENGE

Decided on 23 June 2011

The decision concerned a client relation between a co-arbitrator's law firm and the appointing party's affiliates. The affiliates only had minority interests in the appointing party, and the co-arbitrator's law firm had only represented the affiliates in a few cases.

On 10 February 2011, the claimant commenced arbitration at the DIA. The claimant proposed J as co-arbitrator, and the respondent proposed L as co-arbitrator. The DIA proposed P as the tribunal chair. J and L were both practicing attorneys, and P was a retired court judge.

When the respondent's counsel became aware of the proposals, he requested the DIA to ask J whether he or his law firm had represented the claimant or its affiliated entities. At the DIA's request, J stated that he had represented an affiliate of the claimant before 2004. The respondent's counsel then requested J to disclose

his *law firm's* relations to the claimant or its affiliates. J stated that his law firm had assisted the claimant's affiliates in a few cases.

The DIA then requested the parties to comment on the proposals within 27 April 2011. On 10 June 2011, six weeks after the time limit, the respondent's counsel challenged J on grounds of the relations. The respondent's counsel had not been aware of the letter from the DIA because one of his close family members had passed away a few days before the letter arrived at his office.

Due to the extenuating circumstances, the Committee admitted the challenge despite the delay, but after considering the grounds, the Committee rejected the challenge. According to the Committee, the fact that J's law firm had represented clients with minority interests in the claimant in a few cases did not give rise to justifiable doubts about J's impartiality and independence. The respondent's counsel subsequently brought the challenge before a Danish court, but the court rejected the challenge.⁸⁰

5.30 CASE D-1728: PREVIOUS CLIENT RELATIONS AND ADVERSARIAL RELATIONS

Decided on 11 May 2011

The decision concerned a previous client relation between an arbitrator's law firm and a party and a previous adversarial relation between that law firm and the other party. The fact that both relations were *previous* played a significant role in the Committee's decision.

On 26 January 2011, the claimant commenced arbitration at the DIA. The DIA proposed a tribunal consisting of K and S as co-arbitrators and C as the tribunal chair. K and S were practicing attorneys, and C was a court judge.

When submitting his declaration of impartiality and independence, S informed the DIA and the parties that some partners in his law firm represented the respondent in two minor cases that ended in 2006 and 2007. Another partner in S's law firm represented a party in a minor case against the claimant until 2008. The claimant's counsel challenged S on grounds of these relations.

The Committee noted that the relations were between S's *law firm* and the parties. The Committee also noted that the relations were previous. S's law firm had had a client relation to the respondent until 2007 and an adversarial relation to the claimant until 2008. The Committee noted that S had not been involved in the cases himself. Due to the facts that the relations were previous and that they did not involve S and did not have anything to do with the current case, the

⁸⁰ *X v. Voldgiftsinstituttet* (District Court of Lyngby, 1 Sept. 2011).

Committee rejected the challenge. According to the Committee, such relations do not give rise to justifiable doubts about an arbitrator's impartiality and independence.

5.31 CASE D-1695: RECENT CLIENT RELATIONS

Decided on 30 March 2011

The decision concerned a previous client relation between an arbitrator's law firm and a party's parent company. The client relation ended less than a year prior to the arbitration.

On 22 December 2010, the claimant commenced arbitration at the DIA. The respondent's counsel proposed H as co-arbitrator, and the claimant's counsel proposed F as co-arbitrator. H and F were both practicing attorneys. The DIA proposed U, who was a law professor, as the tribunal chair.

When submitting his declaration of impartiality and independence, F informed the DIA and the parties that partners in the firm where the claimant's counsel worked had appointed him as arbitrator in previous cases. He also informed that partners in his own firm had represented the claimant's affiliates. At the DIA's request, F clarified the affiliation between his law firm's client and the claimant. It appeared that the client was the claimant's owner.

The respondent's counsel challenged F on grounds of the relation. The claimant's counsel argued that F had not been involved in the work for the affiliate and that the work had been unrelated to the dispute. Furthermore, F's firm no longer represented the affiliate. The respondent's counsel argued that the representation had not ended until recently and that the dispute already existed at the time when F's law firm represented the affiliate.

The Committee disqualified F. According to the Committee, the relation gave rise to justifiable doubts about F's impartiality and independence. Because the client relation between F's law firm and the claimant's parent company had not ended until recently, the fact that the client relation no longer existed and had no relation to the arbitration did not make F impartial and independent.

5.32 CASE D-1690: PREVIOUS CLIENT RELATIONS AND ADVERSARIAL RELATIONS

Decided on 31 August 2011 and 4 November 2011

The decision concerned the impartiality and independence of two prospective co-arbitrators proposed by the same party. One of them was a partner in a law firm

that had represented the appointing party in a recent lawsuit. The other one was a partner in a law firm that had represented the other party's opponents.

On 22 December 2010, the claimant commenced arbitration at the DIA. The respondent's counsel proposed L as co-arbitrator, and the claimant's counsel proposed S as co-arbitrator. The DIA proposed T as the tribunal chair. L was a law professor, S was a practicing attorney, and T was a retired court judge.

When S submitted his declaration of impartiality and independence, he stated that a former partner in his law firm, who had recently left the firm, represented the claimant in a lawsuit. The former partner registered the claimant as client two months prior to his exit from the firm, and he brought the case with him when he left the firm. Furthermore, S firm had represented the respondent's opponent in a recent lawsuit.

The respondent's counsel challenged S on grounds of these relations. He noted that the client relation between S's law firm and the claimant did not cease to exist until the partner left the firm in March 2011, which was after the claimant commenced arbitration.

The Committee disqualified S on grounds of the client relation between S's law firm and the claimant. The Committee emphasized the fact that the client relation existed after the claimant commenced arbitration. According to the Committee, the relation gave rise to justifiable doubts about S's impartiality and independence despite the fact that S was not involved in his former partner's case.

After the Committee had disqualified S, the claimant's counsel proposed J as co-arbitrator. Like S, J was a practicing attorney. When the respondent's counsel became aware of the proposal, he informed the DIA that J's law firm had represented the respondent's opposing parties in previous and pending cases. For this reason, J had rejected a request from the respondent's sole shareholder to represent the shareholder in an unrelated matter, which, according to the respondent's counsel, illustrated the severity of the conflict of interest. J argued that there was no relation between these other cases and the arbitration.

The respondent's counsel further noted that J had been the trustee of an estate in bankruptcy that was involved in a lawsuit against the respondent. J had not disclosed this relation when submitting his declaration of impartiality and independence, but the respondent's counsel assumed that it was due to an oversight. As a response to this assumption, J stated that the 'assumption' was a contemptible accusation. According to J, he did not make oversights; when he omitted to disclose information, it was because he considered the information irrelevant. According to the respondent's counsel, the information about J's representation of the respondent's opponent was highly relevant, so J's reaction made the respondent's counsel question whether J had left other similar information undisclosed. Furthermore, the respondent's counsel questioned J's decorum in light of J's strong reaction.

According to the Committee, J's relations to the respondent's opponents gave rise to justifiable doubts about J's impartiality and independence, so the Committee disqualified J. The Committee noted that J should have disclosed his assignment as trustee in the estate of the respondent's opponent when he submitted his declaration of impartiality and independence.

5.33 CASE D-1615: ADVERSARIAL RELATIONS

Decided on 8 November 2010

The decision concerned adversarial relations between an arbitrator's law firm and a party's parent company. The arbitrator's law firm represented a client in a lawsuit against the party's parent company, and the arbitrator's name appeared on the pleadings in the lawsuit.

On 2 July 2010, the claimant commenced arbitration at the DIA. The claimant's counsel proposed E as co-arbitrator, and the respondent's counsel proposed J as co-arbitrator. E and J were both practicing attorneys. The DIA proposed M, a court judge, as the tribunal chair.

Eighteen days after J submitted his declaration of impartiality and independence, J informed the DIA and the parties that his law firm represented a client in a pending lawsuit against the claimant's parent company. The disclosure made the claimant's counsel challenge J. According to the claimant's counsel, J's name appeared on the pleadings in the lawsuit, which indicated that he was involved in the case against the parent company himself.

The respondent's counsel argued that J was not personally involved in the lawsuit regardless of the appearance of his name on the pleadings. Furthermore, the lawsuit was not against the claimant but against the claimant's parent company. J argued that there was no relation between the lawsuit and the arbitration and that none of the information that he obtained in the lawsuit could become relevant in the arbitration, and vice versa. J also noted that it would be difficult to appoint arbitrators from the major Danish law firms if relations such as the present could disqualify an arbitrator.

The Committee noted that it generally considers a daughter company and its parent company as two independent legal entities. However, the Committee considered the claimant's activities to constitute such a vital part of the parent company that the Committee did not consider the two as independent legal entities in this case. The Committee also noted that the decisive element was not J's actual bias but rather the appearance of justifiable doubts about his impartiality and independence. According to the Committee, the facts that J's law firm represented a client in a lawsuit against the claimant's parent company and that J's name appeared on the pleadings in the lawsuit gave rise to justifiable doubts about

J's impartiality and independence regardless of the actual relation between the lawsuit and the arbitration. Accordingly, the Committee disqualified J.

5.34 CASE D-I 594: A NEIGHBOURHOOD RELATION

Decided on 27 September 2010

The decision concerned an arbitrator's relation to an attorney who is associated with a party. The attorney was not the party's counsel but he had advised the party during the course of events that gave rise to the dispute. The relation between the arbitrator and the attorney consisted in informal private interactions on the street on which they both lived.

On 4 June 2010, the claimant commenced arbitration at the DIA. The respondent's counsel proposed M as co-arbitrator. M had a managing position at a large Danish corporation and was a former legal scholar. The claimant's counsel proposed O, who was a manager at a Danish corporation too. The DIA proposed P, a retired court judge, as the tribunal chair.

The claimant's counsel informed the respondent's counsel that O was the opposite neighbour of an attorney who had assisted the claimant in the course of events that gave rise to the dispute. The respondent's counsel challenged O on grounds of the relation. This was before O submitted his declaration of impartiality and independence. When he did so, he clarified the relation and informed the DIA and the parties that he had no professional relation to and no personal friendship with the attorney. According to O, the only interaction between the two was a regular encounter on the sidewalk of their street. The respondent's counsel noted that the attorney, who was O's opposite neighbour, would become a crucial witness in the arbitration. According to the respondent's counsel, the attorney played an important role in the course of events that gave rise to the dispute.

When the attorney, who was O's opposite neighbour and who had assisted the claimant prior to the dispute, submitted his comments on the matter, it appeared that the relation was closer than indicated by O. According to the attorney, he and O met very frequently. They had attended and arranged the same street parties, and they had given each other's kids presents when the kids graduated from high school. They helped each other with lawn mowing and snow clearing. The attorney even noted that he would not consider O as impartial and independent and that he would reject a proposal to arbitrate a case where O was in the attorney's position.

The statements from the attorney did not make the claimant withdraw the proposal. The claimant's counsel noted that the attorney was not a manager in the claimant. The attorney did not even work full time for the claimant any longer.

The Committee rejected the challenge. According to the Committee, the relation between the attorney and O did not give rise to justifiable doubts about O's impartiality and independence. The Committee emphasized the character of the relation between O and the attorney, which was neither a professional relation nor a close personal friendship.

5.35 CASE D-1585: PREVIOUS CLIENT RELATIONS

Decided on 28 October 2010

The decision concerned a client relation between an arbitrator's law firm and a party. The client relation was no longer ongoing, but the arbitrator's law firm had represented the party until approximately half a year before the arbitral proceedings.

On 21 May 2010, the claimants commenced arbitration at the DIA. The claimants' counsel proposed J, a law professor, as co-arbitrator. The respondent's counsel proposed H, a practicing attorney, as co-arbitrator. The DIA proposed P, a court judge, as the tribunal chair.

When submitting his declaration of impartiality and independence, H informed the DIA and the parties that his law firm represented the respondent in a pending case and some previous cases. Furthermore, H stated that his law firm represented a client against one of the claimants.

The claimants' counsel challenged H on grounds of the relations. The respondent's counsel explained that none of the cases was pending. The case that was pending according to H's statement ended approximately half a year prior to the arbitration. H confirmed the clarification. The respondent's counsel further argued that the respondent was not a regular client at H's law firm.

The Committee disqualified H. According to the Committee, the relation gave rise to justifiable doubts about H's impartiality and independence. The Committee emphasized the fact that the client relation between H's law firm and the claimant had not ended until recently and considered the absence of a 'regular' client relation irrelevant; the decisive element was the existence of a client relation regardless of whether it was regular.

5.36 CASE E-1536: CLIENT RELATIONS WITH A PARTY'S AFFILIATES

Decided on 31 May 2010

The decision concerns a client relation between an arbitrator's law firm and a party's affiliates. The arbitrator's law firm represented the party's affiliates in previous and pending cases, and it was likely that the arbitral award might influence these affiliates.

On 10 February 2010, the claimant commenced arbitration at the DIA. The claimant's counsel proposed F as co-arbitrator, and the respondent's counsel proposed M as co-arbitrator. The DIA proposed A as the tribunal chair. F, M and A were all practicing attorneys.

When becoming aware of the proposals, the respondent's counsel noted that F's law firm might have a client relation to the claimant's parent company and that he would challenge F if this were the case. F then informed the DIA and the parties that he was not related to the parties but that his law firm may have represented the claimant's affiliates in previous and pending cases.

The respondent's counsel challenged F on grounds of the relation. According to the respondent's counsel, part of the dispute would concern the claimant's relation to its affiliates, so an arbitrator who represented some of these affiliates would have to step back. The claimant's counsel did not agree. According to the claimant's counsel, the subject matter of the case was not the claimant's relation to its affiliates, so the fact that F's law firm, and not even F himself, had represented the claimant's affiliates did not disqualify F. At the DIA's request, F commented on the challenge too. He noted that the claimant's affiliates were not regular clients in his firm; the firm had merely represented the affiliates in a few cases.

The Committee disqualified F on grounds of the relation between his law firm and the claimant's affiliates. According to the Committee, the facts that employees in the claimant's affiliates might need to testify in the arbitration and that F's firm represented the affiliates in pending cases gave rise to justifiable doubts about F's impartiality and independence. The Committee also noted that the arbitral award might be relevant in relation to future cases against the affiliates. According to the Committee, the facts that the claimant's affiliates were not parties to the dispute and that they were not regular clients in F's law firm did not make F impartial and independent.

5.37 CASE D-1520: SERVICE AS COURT JUDGE IN COURT CASES ON SIMILAR ISSUES

Decided on 10 January 2014

The decision concerned an arbitrator who, as part of his position as a lay judge, decided cases on matters that were closely related to the dispute. After the appointment of the court judge, E, the DIA became aware that E might be involved in some court cases with a close relation to the dispute. E confirmed the fact that he would be deciding cases with a close relation to the dispute. The DIA informed the parties about the matter, but none of them challenged E. The Committee nevertheless brought up the relation *sua sponte* under Article 14(9) of the DIA Rules and disqualified E on grounds of the matter, which, according to the Committee, gave rise to justifiable doubts about E's impartiality and independence. The Committee

further noted that E had breached his duty of disclosure by omitting to disclose the relation when he submitted his declaration of impartiality and independence.

5.38 CASE D-1489: PREVIOUS WORK AS ARBITRATOR IN A RELATED MATTER

Decided on 19 March 2010

The decision concerned an arbitrator who had acted as arbitrator in a previous dispute with close relations to the present dispute. The present dispute arose from the previous dispute, and one of the parties to the present dispute was a party to the previous dispute too.

On 30 November 2009, the claimant commenced arbitration at the DIA. The claimant's counsel proposed N, a practicing attorney, as co-arbitrator. The respondent's counsel proposed C, the CEO of a Danish company, as co-arbitrator. The DIA proposed H, a court judge, as the tribunal chair. The three arbitrators submitted their declarations of impartiality and independence, and the DIA invited the parties to comment on the composition of the tribunal.

The claimant's counsel challenged C on two grounds. First, C had acted as arbitrator in a previous dispute between the claimant and another party, from which the present dispute arose. Secondly, C was not a lawyer. The claimant's counsel referred to Article 16 in the 2008 DIA Rules applicable at that time. According to the provision, all arbitrators must have law degrees unless the parties proposed otherwise and the DIA found it adequate to appoint a non-lawyer in light of the nature of the case. Neither the respondent's counsel nor C commented on the challenge.

The Committee disqualified C for the mere reason that he had acted as arbitrator in a dispute with close relations to the present dispute. According to the Committee, the circumstance gave rise to justifiable doubts about C's impartiality and independence. The Committee did not elaborate on the argument that C was not a lawyer. For general information, the current DIA Rules do not contain a provision similar to Article 16 in the 2008 DIA Rules; the only requirement as to the tribunal members' educational backgrounds under the current DIA Rules is that the *tribunal chair* must have a law degree.

5.39 CASE D-1488: CLIENT RELATIONS AND ADVERSARIAL RELATIONS

Decided on 4 March 2010

The decision concerned a previous client relation between an arbitrator's law firm and a party's affiliate. It also concerned the representation of insurance companies against the parties or affiliates of the parties.

On 25 November 2009, the claimant commenced arbitration at the DIA. The claimant's counsel proposed E, a law professor, as co-arbitrator, and the respondent's counsel proposed C, a practicing attorney, as co-arbitrator. The DIA proposed J, a court judge, as the tribunal chair.

When C submitted his declaration of impartiality and independence, C informed the DIA and the parties that his law firm had represented the respondent in an unrelated case approximately three years earlier and currently represented an insurer of a company against an affiliate of the claimant. Furthermore, the law firm had represented insurers in a number of previous cases that involved the parties. C stated that he had not been involved in any of these cases himself.

The claimant's counsel challenged C on grounds of the relations. As a response, the respondent's counsel argued that there were a large number of attorneys in C's law firm and that the case in which the law firm had represented the respondent was no longer pending. C argued that his personal relation to the parties was so remote that the mere unilateral appointment of him should give rise to more serious concern about his impartiality and independence than his employment at a law firm that had represented him.

The Committee rejected the challenge. According to the Committee, none of the relations gave rise to justifiable doubts about C's impartiality and independence. As to the representation of the respondent, the Committee emphasized the period of approximately three years that had lapsed since C's law firm represented the respondent and the fact that the case did not have anything to do with the arbitration. As to the current representation of an insurer against the claimant's affiliate, the Committee noted that neither the insurance company nor the claimant's affiliate were parties to the present case. Accordingly, the absence of an actual client relation to the insured party when the party is in fact the insurance company played an important role in the Committee's considerations.

5.40 CASE D-1472: AFFILIATION WITH AN ORGANIZATION THAT REPRESENTS
A PARTY

Decided on 15 February 2010

The decision concerned an arbitrator's position as deputy chair in an organization that safeguards the interests of a party to the dispute against the interests of the other party to the dispute.

On 27 October 2009, the claimant commenced arbitration at the DIA. The claimant's counsel proposed K as co-arbitrator, and the respondent's counsel proposed J as co-arbitrator. K and J were both practicing attorneys. The DIA proposed U, a law professor, as the tribunal chair.

When J submitted his declaration of impartiality and independence, he informed the DIA and the parties that he was the deputy chair of an organization that safeguards the respondent's interests against the claimant's interests.

The claimant's counsel challenged J on grounds of his position in the organization and added that J's organization had drafted a rule-set that played an important role in the case. The claimant's counsel added that it was important for the claimant that J's organization did not get access to information on the dispute in order for the claimant to maintain its reputation in the industry. The respondent's counsel argued that J's organization had no interest in the outcome of the case and that J's duty of confidentiality would prevent him from disclosing any information on the case to the organization.

The Committee disqualified J. According to the Committee, J's position as deputy chair in an organization that safeguarded the respondent's interest against the claimant's interests gave rise to justifiable doubts about J's impartiality and independence.

5.41 CASE D-1469: A CLIENT RELATION

Decided on 28 January 2010

The decision concerned a client relation between an arbitrator's law firm and a party. When one of the arbitrators, N, who was a practicing attorney, submitted his declaration of impartiality and independence, he informed the DIA and the parties that his law firm assisted the respondent in pending collection proceedings. Despite the relation, none of the parties challenged N, but as in Case D-1767 concerning a similar relation, the Committee brought up the relation *sua sponte* and disqualified N under Article 14(9) of the DIA Rules. According to the Committee, the disqualification was necessary in order to avoid any risk of annulment or non-recognition.

5.42 CASE E-1443: PREVIOUS INVOLVEMENT IN A RELATED TRANSACTION

Decided on 27 January 2010

The decision concerned two different challenges of two different arbitrators. One of the challenges concerned an arbitrator's previous involvement in a sales process relating to the dispute, which implied a risk that the arbitrator or his firm had obtained knowledge and formed opinions about the dispute. The other challenge concerned an arbitrator's relation to a potential witness in the case.

The claimant had commenced arbitration at the DIA and proposed C as co-arbitrator. C was the president of a large company that had not been involved in the case but had recently hired a person who had been involved in the case. There was a risk that one of the parties would call this person to give evidence in the case. None of the parties challenged C, but the Committee brought up the relation *sua sponte* and disqualified C under Article 14(9) of the DIA Rules.

After the decision, the claimant's counsel proposed another candidate, J, as co-arbitrator. J was a partner in an equity firm. J informed the DIA and the parties that his equity firm had evaluated some possible investments that involved the present dispute. The respondent's counsel clarified the disclosure by explaining that the respondent put up a subsidiary for sale in 2007, on which a series of firms and funds, including J's equity firm, submitted bids. This transaction would eventually lead to the present dispute. J's equity firm got access to a data room, conducted due diligence, and participated in a Q&A session with the subsidiary's management. The firm also participated in negotiations and made an offer in the auction process.

According to the respondent's counsel, the equity firm's participation in this process had provided J with some knowledge and opinions about the subject matter of the dispute, which an arbitrator should not have. The respondent's counsel was afraid that J's knowledge and opinions had made him predisposed, so the respondent's counsel challenged J.

J explained that he was on leave of absence from the equity firm in the period when the bidding took place. The respondent's counsel argued that there was a risk that J, who had an important position in the firm, had obtained knowledge about the subject matter of the case despite his leave of absence. The respondent's counsel referred to the 2004 IBA Guidelines that refer to the situation where an arbitrator has previously been involved in the case on the Waivable Red List. According to the respondent's counsel, J's possible predisposition gave rise to justifiable doubts about J's impartiality and independence, so the respondent's counsel challenged J on grounds of the circumstances.

The claimant's counsel stated that the claimant had not been aware of the circumstances provided by the respondent's counsel concerning the sales process. The claimant's counsel nevertheless considered J impartial and independent, and he argued the appointment of J was necessary in order to obtain an award that was in line with trade usages on the area because the area was highly specialized. The claimant's counsel noted that J did not work for any of the parties and that he would not be giving evidence in the case. Furthermore, the bidding process in which J's firm had been involved was not the same 'case' as the present dispute, which concerned an actual sales and purchase agreement concluded between other parties. According to the claimant's counsel, J had no interest in favouring the claimant, and if any of J's partners in the equity firm had obtained information

about the respondent while J was on leave, they would be obliged to keep the information confidential and thus refrain from sharing it with J.

The Committee disqualified J. According to the Committee, J was not impartial and independent as a partner in a firm that had placed a bid on the respondent's subsidiary, got access to the data room, conducted due diligence, participated in Q&A sessions with the subsidiary's management, negotiated with the respondent's advisors, and made an offer in the auction process.

5.43 CASE E-1350: PROVISION OF A LEGAL OPINION IN A RELATED MATTER

Decided on 7 October 2010

The arbitrator's impartiality and independence was not the main issue in this decision. The main issue was the arbitrator's compensation. However, the arbitrator's impartiality and independence played an important role in the decision, because the arbitrator's compensation depended on the arbitrator's disclosure of a matter that might potentially disqualify the arbitrator.

On 18 February 2009, the claimant commenced arbitration at the DIA. The DIA appointed P and J as co-arbitrators and U as the tribunal chair. P was a practicing attorney, and J and U were both law professors.

During the proceedings and a few weeks prior to the final hearings, the claimant's counsel informed the DIA and the respondent that he had become aware of a matter that, in his view, 'undoubtedly' disqualified U, the tribunal chair. U had drafted a legal opinion on an issue in a previous bankruptcy proceeding arising out of the same dispute as the present arbitration. The claimant's counsel argued that the legal opinion disqualified U from the tribunal and that U had breached his duty of disclosure by omitting to disclose the relation when he submitted his declaration of impartiality and independence.

As a response, U argued that he was not aware of the relation between the bankruptcy proceeding and the present case. The attorney who had asked him to draft the legal opinion was not involved in the arbitration and did not provide him with any information that could link the two cases together. U informed the DIA and the parties that he was willing to step back if he did not have the parties' support but that he would still claim compensation for his work as tribunal chair in the case.

The respondent's counsel did not endorse the claimant's challenge but acknowledged that the claimant's persistent objection against U would make U resign voluntarily. However, the respondent's counsel noted that the claimant, as the challenging party, would have to cover U's compensation in case he resigned. According to the claimant's counsel, U was not impartial and

independent and thus not entitled to compensation, but the respondent's counsel argued that U was entitled to compensation from the claimant because the reason for his withdrawal was the claimant's unfounded challenge.

Due to the parties' disagreement, the Committee decided on the issue. The Committee assumed that U had not been aware of the relation between the bankruptcy proceeding and the present case. According to the Committee, there was no reason for holding that U *ought* to be aware of the relation until the claimant's counsel informed him about it. Accordingly, the Committee decided that U was entitled to compensation.

5.44 CASE D-I304: INVOLVEMENT IN THE PRE-DISPUTE COURSE OF EVENTS

Decided on 15 January 2009

The decision concerned a relation between an arbitrator's law firm and the dispute. The arbitrator's law firm represented a client who was involved in the course of events that gave rise to the dispute.

On 31 October 2008, two claimants commenced arbitration at the DIA. The respondent's counsel proposed S as co-arbitrator, and the claimants' counsel proposed P as co-arbitrator. The DIA proposed J as the tribunal chair. S was a law professor, and P and J were both practicing attorneys.

The dispute arose from the respondent's acquisition of a company. A number of companies, including the parties to the dispute, placed bids on the company in the bidding process. The respondent placed the winning bid and acquired the company. The two claimants had both participated in the bidding process, but they did not outbid the respondent. It appeared that the law firm where P was a partner had represented a client, which was part of the same consortium as the two claimants, in the bidding process. This client was not a party to the present dispute, but the consortium's participation in the bidding process was unsuccessful.

The respondent's counsel challenged P on grounds of the relations between P's law firm and the parties. According to the respondent's counsel, the participant that P's law firm had assisted in the bidding process shared the claimants' interests in the present dispute. P stated that it was some of his colleagues at the firm, and thus not himself, who represented the participant in the bidding process. P even submitted a letter from his colleague confirming that P was not involved in the work for the participant.

The Committee noted that the takeover and the circumstances leading to the present dispute took place shortly after one another and that the case in which P's law firm was involved might be associated with the present dispute. According to

the Committee, these relations gave rise to justifiable doubts about P's impartiality and independence, so the Committee disqualified P.

5.45 CASE E-1272/1275: PREVIOUS APPOINTMENTS AND A POSITION ON THE DIA'S BOARD

Decided on 1 December 2008 and 13 January 2009

The decision concerned previous appointments by the appointing law firm and an arbitrator's position on the DIA's board. The case illustrates the distinction between facts and circumstances covered by the duty of disclosure, on one hand, and facts and circumstances disqualifying an arbitrator, on the other.

On 29 August 2008, the respondent's counsel proposed M as co-arbitrator. The claimant's counsel had proposed F as co-arbitrator, and the DIA had proposed P. M and F were law professors, and P was a practicing attorney. When submitting his declaration of impartiality and independence, M informed the DIA and the parties that the respondent's counsel had proposed or appointed him as arbitrator in two previous cases within the past five years.

M's disclosure made the claimant's counsel challenge M. According to the claimant's counsel, the appointment of M would not be convenient in light of the previous appointments. As a response, the respondent's counsel explained that he worked for one of the biggest law firms in Denmark and that M was a distinguished Danish arbitrator with a good reputation, whom the major Danish law firms appointed on a regular basis. M explained that only one of the previous appointments was unilateral. This appointment took place more than three years prior to M's appointment in the present case, and the attorney who made the appointment no longer worked at the same firm as the respondent's counsel. The other appointment was a joint appointment as sole arbitrator.

According to the Committee, the previous appointments did not disqualify M. The Committee emphasized the facts that there were only two previous appointments from the same law firm within the past five years and that none of the underlying cases had any relation to the present case. The Committee informed the parties of its decision on 1 December 2008.

On 5 December 2008, the claimant's counsel challenged M again. This time, the ground for the challenge was M's position as president on the DIA's board. According to the claimant's counsel, M or the Committee should have informed the claimant about this position when the respondent's counsel proposed M as co-arbitrator. The claimant's counsel stated that, 'Normally and as a Principle the President of the Court functions as third party to the proceedings.' The claimant's

counsel considered the situation as ‘very serious’ and stressed its disappointment with the Committee’s decision.

M did not take part in the Committee’s decision on his impartiality and independence, and the DIA notified the parties about this in its decision. M informed the claimant’s counsel that the DIA generally accepted appointments of the president and other members of its board as co-arbitrators or tribunal chairs in disputes under the DIA Rules. M also explained that the arbitral institutions that he knew of followed a similar practice. The respondent’s counsel informed the claimant’s counsel that the position as president of the DIA’s board was an administrative position with no relation to the specific case. M stated that he was not involved in the proposal of P as the tribunal chair in the specific case. Under the former DIA Rules, the body in charge of proposing arbitrators was the DIA’s Secretariat and not, as under the present DIA Rules, the Committee.

The Committee confirmed that M had not been involved in the proposal of P as the tribunal chair or in any other decisions regarding the case on behalf of the DIA. For these reasons, the Committee rejected the challenge and appointed M as co-arbitrator. The DIA has subsequently amended the DIA Rules so that the president and vice president in the DIA’s board cannot act as arbitrators. The new provision, Article 1(4), accordingly prevents the circumstances from giving rise to future challenges. Other members of the DIA’s board may still act as arbitrators if any of the parties have proposed them.

5.46 CASE E-1269: THE ARBITRATOR’S CONDUCT

Decided on 28 January 2014

The decision concerned a sole arbitrator’s conduct of the proceedings and the arbitrator’s communication to the parties. The decision concerned a series of specific detailed provisions in the DIA Rules, including Article 13 and Article 14.

On 14 August 2008, the claimant commenced arbitration at the DIA. The parties jointly appointed M, a court judge, as the sole arbitrator. M submitted a declaration of impartiality and independence, and the DIA appointed her as the sole arbitrator.

During the case, M and the parties scheduled the oral hearings to take place 29 to 31 October 2013. A few weeks before the planned hearings, the claimant’s counsel informed M that he would no longer represent the claimant because of the claimant’s uncertain financial situation. At the same time, the resigning counsel requested a postponement of the oral hearings on behalf of the claimant because the claimant’s director was not able to attend the

hearings on the scheduled dates due to his testimony in another important arbitration. M proposed some alternative dates, but the respondent's counsel stated that it would be very inconvenient for the respondent to postpone the hearings due to hotel, transportation and visa arrangements. For this reason, M decided to stick to the original schedule and refuse to postpone the hearings.

M informed the claimant that she could dismiss the claim and issue an award in favour of the respondent if the claimant or its counsel would not be present at the hearings. Now that the claimant was no longer represented by counsel and the claimant's manager would have to give evidence in another jurisdiction, there was an actual possibility that the claimant would not be present at the hearings. The claimant complained about M's decision to maintain the schedule, but M refused to postpone the hearings.

The claimant insisted that M would have to postpone the hearings and argued that the respondent's travel arrangements did not justify M's decision to maintain the schedule, but despite the claimant's endeavours, M refused to postpone the hearings. Finally, the claimant asked M to recuse herself from the proceedings. M informed the claimant that she found no grounds for recusing.

The claimant then challenged M on four main grounds. The first ground was M's refusal to postpone the hearings. The second ground was M's statement that she could dismiss the claim and issue an award in favour of the respondent if the claimant or its counsel would not be present at the hearings. The third ground was M's decision not to recuse from the proceedings. The fourth ground was M's decision to continue the proceedings while a decision was pending.

The Committee rejected the challenge. According to the Committee, none of the grounds raised by the claimant gave rise to justifiable doubts about M's impartiality and independence. The DIA's Secretariat directed the claimant's representatives, one of whom was an attorney, to Article 14(5) to (7) of the applicable 2007 DIA Rules when they raised the challenge. A brief study of the procedural rules might have discouraged the claimant from raising the challenge, but whether the claimant's representatives were actually familiar with the DIA Rules remains uncertain. The claimant subsequently brought the challenge before a Danish court, but the court rejected the challenge.⁸¹

⁸¹ *X v. Voldgiftsinstituttet* (District Court of Copenhagen, 17 Apr. 2015).

5.47 CASE D-1260: PREVIOUS WORK FOR THE CEO OF A PARTY'S AFFILIATE

Decided on 7 November 2008

The decision concerned the relation between an arbitrator and the CEO of a party's affiliate. The arbitrator had provided legal services to the CEO in an unrelated matter.

On 5 August 2008, the claimant commenced arbitration at the DIA. The claimant's counsel proposed S as co-arbitrator, and the respondent's counsel proposed H as co-arbitrator. S and H were both practicing attorneys. The DIA proposed C, a court judge, as the tribunal chair. S, H and C all accepted to serve as arbitrators and submitted their declarations of impartiality and independence.

H informed the DIA and the parties that he had a previous client relation to a CEO of the respondent's affiliate. H represented the CEO at a general meeting and drafted an option agreement for the CEO, and the work amounted to a total fee of DKK 10,000 (EUR 1,340). Besides that, there was no relation between H and the CEO. The claimant's counsel challenged H on grounds of the relation. The respondent's counsel and H did not consider the relation to give rise to justifiable doubts about H's impartiality and independence.

According to the Committee, the relation gave rise to justifiable doubts about H's impartiality and independence. The Committee referred to the IBA Guidelines and noted that the relation was covered by the Orange List on relations that may, but do not necessarily, give rise to justifiable doubts about an arbitrator's impartiality and independence. The Committee noted that the company in which H's client was a CEO was not identical with the respondent but that the relation between the two companies was close. The Committee further noted that the client relation between the arbitrator and the CEO did not end until shortly before the course of events that gave rise to the dispute. The insignificant amount of money that H received from the CEO for his work did not make H impartial and independent in the Committee's view. The Committee indicated that it would not have disqualified H *sua sponte* if the claimant's counsel had not challenged him.

5.48 CASE E-1241: A COLLEAGUE'S PREVIOUS INVOLVEMENT IN THE DISPUTE

Decided on 1 October 2008

The decision concerned a situation where an attorney at the arbitrator's law firm had previously been involved in the dispute. On 7 July 2008, the claimant commenced arbitration at the DIA. The claimant's counsel proposed M as co-arbitrator, and the respondent's counsel proposed N as co-arbitrator. The

DIA proposed K as the tribunal chair. M was a law professor, and N and K were practicing attorneys.

N informed the DIA and the parties that the respondent's counsel had appointed him in a previous case and that one of the attorneys at N's law firm had worked for the claimant's counsel where he was involved in the case until a few months before the arbitration.

Despite the relations, none of the parties challenged N. It remains uncertain whether the reason for this was the fact that N had relations to both sides and not just one side. Nevertheless, the Committee brought up the relation *sua sponte* and disqualified N under Article 14(9) of the DIA Rules.

According to the Committee, the previous appointment did not give rise to justifiable doubts about N's impartiality and independence, but the fact that one of the attorneys at N's law firm had worked for the claimant's counsel and been involved in the case until a few months before the arbitration gave rise to justifiable doubts about N's impartiality and independence. The Committee emphasized that it was not the fact that the attorney at N's law firm had worked for the claimant's counsel that gave rise to justifiable doubts; it was the fact that the attorney had been involved in the dispute. It appeared from the documents in the case that the attorney's involvement had been extensive.

The Committee referred to the Danish rules on professional conduct for the Danish Bar and Law Society. According to these rules, which are non-binding, an attorney may not act as arbitrator in a case where the attorney or someone from the attorney's law firm has previously represented one of the parties in a matter related to the dispute. N would violate these rules if he served as arbitrator in the case. The Committee noted that a violation of the Danish rules on professional conduct for the Danish Bar and Law Society could potentially make a Danish court set aside or refuse to recognize an award rendered by N. The Committee also noted that the DIA does not want to contribute to violations of these rules.

5.49 CASE D-1239: A CLIENT RELATION

Decided on 3 October 2008

The decision concerned a client relation between an arbitrator's law firm and a party. The party was not a regular client at the law firm, and there was no relation between the arbitration and the cases in which the law firm had represented the party.

On 2 July 2008, the claimant commenced arbitration at the DIA. The claimant's counsel proposed C as co-arbitrator, and the respondent's counsel

proposed J as co-arbitrator. C and J were both practicing attorneys. The DIA proposed P, a law professor, as the tribunal chair.

C informed the DIA and the parties that his law firm had recently received an assignment for one of the parties. The reason why C's law firm had received the assignment was that the party's regular law firm, which appeared to be the firm where the claimant's counsel worked, was conflicted and therefore forced to pass on the assignment to another, in this case C's, law firm. Accordingly, the claimant was not a regular client at C's law firm but at the law firm where the claimant's counsel worked.

The respondent's counsel challenged C on grounds of the client relation. The claimant's counsel argued that C was impartial and independent because the assignment that C's law firm had received concerned an unrelated opponent and an unrelated matter. There were no close financial or professional relations between C's law firm and the claimant. The respondent's counsel agreed that there were no such relations but argued that it would give rise to concern if an arbitrator decided a case involving a client at his law firm.

The Committee disqualified C. According to the Committee, the client relation gave rise to justifiable doubts about C's impartiality and independence despite the fact that the claimant was not a regular client at the law firm and despite the fact that the cases were unrelated.

5.50 CASE E-1202: AN ADVERSARIAL RELATION

Decided on 2 July 2010

The decision concerned an adversarial relation between an arbitrator's law firm and a party. The arbitrator's law firm represented a client against the respondent in an unrelated matter.

On 10 February 2010, the DIA appointed H and O as co-arbitrators and D as the tribunal chair. The claimant had proposed H, the respondent had proposed O, and the DIA had proposed D. H, O and D were all practicing attorneys.

The respondent's counsel became aware that H's law firm had recently undertaken an assignment for a client in a dispute against the respondent and challenged H on grounds of the adversarial relation.

H informed the DIA and the respondent that the respondent's counsel had raised the challenge after the expiration of the fifteen days' time limit in the DIA Rules because, according to H, the respondent had become aware of the relation sixteen days before the respondent's counsel raised the challenge. Secondly, H argued that he was impartial and independent. H referred to the Danish rules on professional conduct for the Danish Bar and Law Society, which do not

disqualify an attorney in a similar situation. He also referred to the IBA Guidelines that classify the situation on the Orange List. He argued that his colleague was only acting against the respondent in one case, and that there was no relation between that case and the arbitration.

The respondent's counsel argued that the respondent became aware of the relation later than sixteen days before he raised the challenge. Sixteen days before the respondent's counsel raised the challenge, a senior sales manager in the respondent received an email clarifying the relation, but the senior sales manager had nothing to do with, and no knowledge of, the arbitral proceedings. The respondent's counsel argued that an email to a sales manager who is not involved in the arbitral proceedings does not make the time limit run. Furthermore, the respondent's counsel argued that only three partners in H's law firm dealt with the subject matter that the dispute concerned. One of them was H and another was the one who acted against the respondent. The respondent's counsel referred to the Danish rules on professional conduct for the Danish Bar and Law Society, according to which one attorney's prior client relation to a party may disqualify other attorneys working at the same law firm from being arbitrators in matters concerning that party.

The Committee disqualified H. According to the Committee, the adversarial relation between H's law firm and the respondent gave rise to justifiable doubts about H's impartiality and independence despite the fact that the two cases were unrelated. The Committee noted that the time limit was not relevant under the circumstances because of the Committee's powers to disqualify an arbitrator *sua sponte*. By stating this, the Committee implicitly stated that it would have disqualified H even in the absence of a challenge.

After the disqualification, H contacted the DIA and requested payment of a fee for his work as arbitrator in the case. The DIA rejected H's request. The DIA noted that H was responsible for the disqualification because his law firm accepted an assignment against the respondent while the case was pending. Furthermore, it followed from the DIA's policy on arbitrators' fees that the DIA could only pay fees to H if it reduced the fees to his substitute and perhaps to the other two arbitrators as well. Considering the work performed by H and the work performed by his substitute and the other arbitrators, the DIA did not find it proper to reduce the substitute's fees and pay fees to H instead.

5.51 CASE D-1145: A PREVIOUS APPOINTMENT BY THE SAME PARTY

Decided on 25 February 2008

The decision concerned an arbitrator's previous appointment by the same party in another pending case. As opposed to the majority of decisions on previous

appointment, the decision concerned a previous appointment from the same party and not from the same counsel.

On 9 January 2008, the respondent proposed J, a practicing attorney, as co-arbitrator in the case. When submitting his declaration of impartiality and independence, J informed the DIA and the parties that the respondent had appointed him in another, ongoing case. The claimant's counsel challenged J on grounds of the previous appointment.

According to the Committee, the relation between J and the respondent was a borderline situation. The Committee referred to the IBA Guidelines that mention a similar situation on the Orange List dealing with situations that may, but do not necessarily, disqualify an arbitrator.

In the Committee's view, the mere fact that the respondent had appointed J in another pending case did not give rise to justifiable doubts about J's impartiality and independence. The Committee assumed that the present dispute and the other pending dispute did not concern 'a related issue,' as the example on the Orange List requires, because neither the parties nor J claimed that this was the case. However, the Committee noted that even if it assumed that the two disputes concerned a related issue, it would not disqualify J, because the claimant did not provide any specific reasons why the relation would give rise to justifiable doubts about J's impartiality and independence. Accordingly, the Committee rejected the challenge.

5.52 CASE E-1129: WORKING GROUP RELATIONS

Decided on 20 May 2008

The decision concerned a situation where an arbitrator had been a member of the same working group as an attorney in the law firm where a party's counsel worked. The working group finished its work approximately four years prior to the arbitration.

On 11 October 2007, the claimant commenced arbitration at the DIA. The claimant's counsel proposed K as co-arbitrator. The respondent's counsel, who had previously challenged the DIA's competence, did not propose a co-arbitrator. Accordingly, the DIA proposed a tribunal consisting of K and P as co-arbitrators and B as the chair. K and B were both practicing attorneys, and P was a law professor.

The respondent's counsel challenged all three arbitrators. The ground for the challenge was the arbitrators' relations to the claimant's counsel. According to the respondent's counsel, all of the three arbitrators had business relations with the law firm where the claimant's counsel was a partner. The respondent's counsel pointed

out that, 'for example', another partner in the law firm had published a report on the Danish Arbitration Act with one of the arbitrators in 2003.

The report from 2003 appeared to be the only relation between the claimant's counsel and the arbitrators. Two of the arbitrators, K and P, and a partner from the law firm where the claimant's counsel worked had been members of a working group that drafted the report and published it in 2003. Only the committee's chair, P, received a salary for his work on the report. P informed the respondent's counsel that the relation was similar to example 4.4.1 on the Green List in the 2004 IBA Guidelines. Besides the relation from the working group, there were no relations between K and P, on one hand, and the law firm where the claimant's counsel worked, on the other. B informed the respondent's counsel that there were no relations between him and the law firm whatsoever.

The Committee rejected the challenge. According to the Committee, the relation did not give rise to justifiable doubts about the impartiality and independence of any of the arbitrators.

5.53 CASE E-1111: ALLEGED ENMITY

Decided on 6 March 2008

The decision concerned alleged enmity between an arbitrator and a party's counsel. According to the party's counsel, the two were enemies, but according to the arbitrator, there was no hostile relation between them.

On 4 October 2007, the respondent's counsel proposed M as co-arbitrator. The claimant's counsel had proposed P as co-arbitrator, and the DIA had proposed L as the tribunal chair. M, P and L were all practicing attorneys. The arbitrators submitted their declarations of impartiality and independence, and the DIA asked the parties to comment on the information disclosed in that connection.

The claimant's counsel challenged M on the ground of a hostile relation between the two. The claimant's counsel and M had represented opposing parties in a number of cases. According to the claimant's counsel, M had expressed a hostile attitude towards him, and M had even reported him to the police and the Disciplinary Board of the Danish Bar and Law Society on a few occasions. According to the claimant's counsel, the hostile relation between M and him emanated from his representation of M's uncle in a previous lawsuit against M's father.

M confirmed the fact that he and the claimant's counsel had represented opposing parties and that they had reported each other to the Disciplinary Board of the Danish Bar and Law Society a few times, but he argued that he had never reported the claimant's counsel to the police. M reported a matter to the police

many years ago, which involved a large Danish company that the claimant's counsel had represented in a lawsuit against M's client. According to M, the police may then have extended their investigation to the claimant's counsel, but M did not report the claimant's counsel specifically. M noted that he had filed other police reports throughout his career as an attorney, and that he only did so when he suspected a criminal offense. He also noted that all of his reports to the Disciplinary Board of the Danish Bar and Law Society concerning the claimant's counsel had resulted in sanctions from the disciplinary board against the claimant's counsel whereas none of the reports issued by the claimant's counsel against M had resulted in sanctions.

M confirmed the dramatic family dispute between his father and his uncle. He remembered that the lawsuit ruined his father, but it unfolded more than thirty years ago, and M was only a child back then. M did not recall his father mentioning the claimant's counsel when talking about the lawsuit.

The Committee rejected the challenge. According to the Committee, the facts and circumstances described by the claimant's counsel did not demonstrate a hostile relation between the claimant's counsel and M. Accordingly, the facts and circumstances did not give rise to justifiable doubts about M's impartiality and independence. The Committee noted that M's family dispute and his reports to the police and the Disciplinary Board of the Danish Bar and Law Society unfolded a long time ago, and the Committee did not find any proof that these circumstances had resulted in, or were the results of, a conflict between the claimant's counsel and M. The Committee emphasized the fact that all of M's reports to the disciplinary board, all of which M issued on behalf of his clients and not on his own behalf, resulted in sanctions against the claimant's counsel.

5.54 CASE E-1099: PUBLIC EXPRESSION OF OPINIONS ON LEGAL ISSUES RELATED TO THE CASE

Decided on 19 September 2007

The decision concerned an arbitrator's public expression of opinions on legal issues related to the case. The arbitrator had expressed the opinions in an interview published in a major Danish newspaper.

The claimant had commenced arbitration at the DIA and proposed F, a practicing attorney, as co-arbitrator. The respondent's counsel challenged F on the ground that F had expressed his opinion on a legal issue related to the case. The legal issue was controversial, and the Danish courts had not yet decided on it, but F had expressed his opinion about it in an interview to a major Danish newspaper. The claimant's counsel argued that F's expression reflected the conclusions in a

recent letter from the ministry in charge of the matter and that any attorney who dealt with the area had an opinion about the issue.

The Committee rejected the challenge. According to the Committee, F's expression of an opinion on the issue did not give rise to justifiable doubts about F's impartiality and independence. The respondent subsequently brought the challenge before the Danish courts, but both the district court and the high court rejected the challenge.⁸²

5.55 CASE D-836: RELATIONS TO A PARTY'S COUNSEL AND AFFILIATE

Decided on 10 January 2007

The decision concerned two relations. One of them was a previous cooperative relation between an arbitrator's law firm and the law firm where a party's counsel worked. The other one was a previous client relation between the arbitrator and a party's affiliate.

On 6 October 2006, the respondent's counsel proposed N as co-arbitrator. N was a practicing attorney. The claimant's counsel challenged N on the ground that N and the respondent's counsel were partners in the same law firm until 2004. The respondent's counsel was still a partner in the law firm. The claimant's counsel referred to the IBA Guidelines classifying the relation as part of the Orange List.

N informed the DIA and the respondent that his current law firm demerged from the firm that the claimant's counsel worked at in the beginning of 2004. He enclosed a previous decision from the Committee (D-807) holding that he was impartial and independent on grounds of the same relation in a different case. In the previous decision, the Committee described the relation as a borderline case but decided not to disqualify N in the absence of other grounds.

When N informed the DIA and the claimant about the previous decision, he also stated that he represented the respondent's affiliate in a transaction in 2003 and 2004. The claimant's counsel then added this relation as an additional ground for his challenge and noted that this relation was on the Orange List too. The claimant's counsel argued that the respondent could easily find another qualified arbitrator.

N argued that he and the claimant's counsel were actually not 'partners in the same firm' in the traditional sense. They shared the same name and the same brand, but partners in one branch did not share their profit and information with partners in another branch, and N and the respondent's counsel were partners in different

⁸² X v. Voldgiftsinstituttet, 2009 Ugeskrift for Retsvæsen 550 (Eastern High Court of Denmark, 27 Nov. 2008).

branches. Furthermore, N argued that the respondent's affiliate was not his regular client and that the client relation ended more than three years ago.

The Committee rejected the challenge. As to N's relation to the law firm where the claimant's counsel worked, the Committee referred to its previous decision (D-807) on the same relation. As in the previous case, the Committee did not find any specific circumstances that made the relation give rise to justifiable doubts about N's impartiality and independence. The Committee noted that the relation ended approximately three years ago.

As to N's previous representation of the respondent's affiliate, the Committee noted that the representation ended approximately three years ago and that there was no relation between the previous transaction and the present dispute. According to the Committee, the relation did not give rise to justifiable doubts about N's impartiality and independence.

5.56 CASE D-820: CLIENT RELATIONS

Decided on 12 September 2006

The decision concerned a client relation between an arbitrator and the arbitrator's law firm, on one hand, and a party and other parties with financial interests in the outcome of the dispute, on the other.

The respondent's counsel proposed A as co-arbitrator, and the claimant's counsel proposed B as co-arbitrator. The DIA proposed C as the tribunal chair. A was a law professor, and B and C were practicing attorneys.

When submitting his declaration of impartiality and independence, C informed the DIA and the parties that he and other partners in his law firm represented the respondent as well as other parties with financial interests in the outcome of the dispute. The claimant's counsel challenged C on grounds of the disclosed relations. According to C, his law firm was not the respondent's main liaison law firm, and the respondent was not the main client of C's law firm. When C himself had represented the respondent, the cases had not concerned the same subject matter as the present dispute. Furthermore, C argued that there were only a few qualified arbitrators within the relevant legal area, so the parties would not avoid relations such as these.

The Committee disqualified C. The Committee stated that a situation where an arbitrator or the arbitrator's law firm represents a party to the dispute or a party who has a significant financial interest in the outcome of the dispute would normally give rise to justifiable doubts about an arbitrator's impartiality and independence. The present case was no exception. The fact that C and other partners at his law firm represented the respondent and other parties with financial

interests in the outcome of the dispute gave rise to justifiable doubts about C's impartiality and independence.

5.57 CASE D-807: RELATIONS TO A PARTY'S COUNSEL

Decided on 6 July 2006

The decision concerned a professional relation between an arbitrator and a party's counsel. The arbitrator's law firm used to share its name and brand with the law firm where the party's counsel worked.

The claimant's counsel proposed N, a practicing attorney, as co-arbitrator. The respondent's counsel challenged N on the ground that N and the claimant's counsel were partners in the same law firm until 2004. The claimant's counsel was still a partner in the law firm, but N and some colleagues resigned and formed a new firm in the beginning of 2004.

The 'law firm' was not a traditional one but rather a group of independent branches sharing the same name and brand. Partners in one branch did not share their profits and information with partners in other branches. N and the claimant's counsel were partners in different branches. When N resigned in 2004, the present dispute and the preceding course of events had not yet unfolded.

The Committee stated that the mere fact that a party is uncomfortable with a certain arbitrator does not disqualify the arbitrator. The Committee characterized the relation between N and the claimant's counsel as a borderline situation and referred to the IBA Guidelines, which classify the relation as part of the Orange List. Under international principles and best practices, the relations on this list *may*, but do not automatically, disqualify an arbitrator. Because the respondent had not invoked other grounds for the challenge than the previous cooperative relation between N and the claimant's counsel, the Committee rejected the challenge. The decision illustrates a crucial aspect of the development in the Committee's practices towards a more strict approach to borderline circumstances. Today, the Committee would probably have disqualified the arbitrator on grounds of the relations.

